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82-332

No._____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

MAS FUJIMOTO, DELMER EISERT,
ROBERT GUY and AGNES GUY, Petitioners,

v.

CITY OF HAPPY VALLEY, et al, Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the Fifth Amendment's Just Compensation Clause, as applied to the Due Process Clause of the Fourteenth Amendment, prohibit the City of Happy Valley from depriving landowners in the City of all economically viable uses of their property for a period of not less than seven years by enacting a comprehensive plan and zoning ordinance which designate the property for open space and low density residential use and which sets forth development criteria which prevent the landowners from developing the property in accordance with reasonable, investment-backed expectations; by simultaneously preventing the installation of sanitary sewers, which would enable the landowners to meet development criteria in the plan and ordinances; by declaring a moratorium

on development applications; by rejecting development applications submitted by the landowners; and by delaying the adoption of a revised plan, development ordinance and facilities plan mandated by Oregon law?

2. Does 42 USC §1983 prevent the City and its officials from depriving landowners in the City of all economically viable uses of their property by engaging in such conduct, and, further, require compensation for the deprivation of such use for the period of deprivation?

3. May the City avoid compensating landowners for deprivation of all economically viable uses of their property for a period of at least seven years merely by enacting a comprehensive plan and zoning ordinance in 1980, which arguably designates the landowners' property for development rights and which

revises the 1973 comprehensive plan and zoning ordinance, which precluded such rights.

4. Do landowners forfeit constitutional and statutory rights to compensation for such deprivation by challenging the validity of the City's 1980 comprehensive plan and zoning ordinance under state law in proceedings before the Land Conservation and Development Commission; alternatively, must the federal district court abstain from deciding the temporary taking claim during the pendency of state proceedings.

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* The complaint named as defendants, in addition to the City of Happy Valley, the Mayor of the City of Happy Valley, James Robnett, the members of the City Council of Happy Valley, Donald Stuck, Joseph Cannard, Sandra Coats, Richard Shaffer, William Ross, the members of the Planning Commission of Happy Valley, James Grady, Ed Rebstock, Kermit Schneider, Kenneth Quick, Larry Dawson, Sandra Roth, Corey Gustafson, the City Engineer, Michael Bye and the Citizens' Advisory Council Chairman, Larry Frey

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No._____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

MAS FUJIMOTO, DELMER EISERT,
ROBERT GUY and AGNES GUY,

Petitioners,

v.

CITY OF HAPPY VALLEY, et al,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on March 29, 1982.

OPINION BELOW

The opinion of the Ninth Circuit Court of Appeals, not to be published,

appears in the appendix hereto. The opinion of the District Court for the District of Oregon appears in the appendix as well.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on March 29, 1982. A timely petition for rehearing was denied and a suggestion for rehearing en banc was rejected on May 27, 1982, and this Petition for Certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 USC §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Fifth Amendment

> No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution, Fourteenth Amendment, Due Process Clause.

> [N]or shall any state deprive any person of life, liberty or

> property, without due process of law . . . .

United States Code, Title 42:

> Section 1983. Civil action for deprivation of rights.
>
> Every person, who under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

Each of petitioners has owned undeveloped real property in the City of Happy Valley, Oregon, since 1970, collectively comprising 150 acres. Petitioners seek to develop their land for residential purposes. The City was incorporated in 1965 to prevent annexation of the area by the City of Portland. In 1970, the City adopted a zoning ordinance

designating petitioners' land for one residential unit per 20,000 square feet.

In 1973, the City adopted a comprehensive plan, which is the controlling land use document under Oregon law. Portions of petitioners' property were identified as "open space" on the comprehensive plan map. The remainder of petitioners' property was designated for residential construction subject to minimum lot size criteria based upon the suitability of the soil for subsurface sewage disposal. Because of soil characteristics of petitioners' land, their property could not be developed in an economically feasible way for residential use under the criteria established in the comprehensive plan without the installation of sanitary sewers. Although the comprehensive plan contained the assumption that sewers would

ultimately be installed, the City has failed to prepare a facilities plan to remedy sewage disposal problems within the City. Soil characteristics also rendered petitioners' property unsuitable for agricultural or forestry production. In 1973, the Oregon Legislature required all cities and counties to adopt and revise comprehensive plans and implementing ordinances in compliance with statewide planning goals promulgated by the newly created Land Conservation and Development Commission, to be effective in 1975. Cities in the metropolitan Portland area were also required to comply with the plans and policies of the Columbia Region Association of Governments, the designated regional planning agency.

In 1976, the City prompted the regional planning agency to classify it as a rural area on the regional plan map.

Under regional policies, sewers could not be extended into areas so classified. All other cities in the region were classified as urban areas on the regional map. Petitioners appealed the decision of the regional planning agency as a violation of statewide planning goals before the Land Conservation and Development Commission. The City's rural designation was invalidated and it was subsequently identified as an urban area on the regional plan map.

In 1976, the City initiated the process of revising its comprehensive plan. In September 1977, the City enacted a moratorium on the partitioning of lands within the City until the revised comprehensive plan for the City was adopted. In November, 1977 the City enacted a 1.5 acre minimum average lot size for residential construction. In May, 1978, the City expanded its moratorium to include the

subdivision of land.

Petitioners have made repeated attempts to obtain development rights and to procure sanitary sewers for their property. The City failed to act upon subdivision proposals submitted by petitioner Mas Fujimoto in the years 1972 and 1976. The City denied the request of petitioners Robert and Agnes Guy for annexation of their property to the County Service District for the purpose of obtaining sewer service. In August, 1977, the City opposed the petitioners' efforts to withdraw their property from the City for the purpose of obtaining sewer service. The City refused to accept subdivision proposals drafted in accordance with the City's subdivision ordinance in May, 1978 and instead revised the moratorium on partitioning of land to include a moratorium on subdivisions.

Because this matter was disposed of on Respondents' motion for summary judgment, the foregoing facts are those alleged in petitioners' complaint and in affidavits and other documentation submitted during summary judgment proceedings. Because the Ninth Circuit Court of Appeals made inquiries during oral argument, the following facts are also material to the case.

The City adopted a new comprehensive plan and a land development ordinance replacing the 1973 comprehensive plan and 1970 zoning ordinance in August, 1980. The City petitioned the Land Conservation and Development Commission for review of its plan and ordinances for compliance with statewide planning goals in September, 1980. Petitioners, together with other agencies and organizations, have contested the validity of the plan

during these proceedings and have advocated higher residential densities for the City than those proposed in the new plan.

Petitioners brought this action in the federal district court for the District of Oregon on May 26, 1978. Petitioners claimed that their property had been taken without the payment of just compensation as required by the Fifth and Fourteenth Amendments of the United States Constitution and that the conduct of the City and its officials constituted a violation of 42 USC §1983. Petitioners sought 2.2 million dollars in damages. Jurisdiction was premised upon 28 USC §1331 and §1343 and under the Fifth and Fourteenth Amendments of the United States Constitution.

The matter came before a magistrate upon the respondents' motion for summary

judgment. The magistrate recommended, and the District Court concluded, that the federal court should retain jurisdiction but abstain from decision on the federal issues pending adjudication of state law questions in state court. Petitioners appealed the abstention ruling to the Ninth Circuit Court of Appeals. The Court of Appeals reached the merits of the case, concluding that petitioners' complaint failed to state a claim upon which relief could be granted and dismissed the action.

REASONS FOR GRANTING THE WRIT

1. The decision below conflicts with the decisions of this Court as to the proper interpretation of the Just Compensation Clause of the Fifth Amendment, as applied through the Due Process Clause of the Fourteenth Amendment.

The opinion of the Ninth Circuit below reduces inverse condemnation analysis

involving land use to a single principle: where the plan and ordinances of a municipality provide for residential use of the property at a density equivalent to that in this Court's decision in Agins v. City of Tiburon, 447 U. S. 255 (1980), there can be no taking. In reaching this conclusion, the Court misconstrues applicable federal law and misstates applicable facts. If allowed to stand, the decision assures that no taking claims involving land use regulations will ever go to trial in the Ninth Circuit. The opinion also can be expected to have an effect on the State of Oregon in its attempts to interpret the just compensation provisions of the federal constitution and of the equivalent provisions of the state constitution in the context of mandated statewide land use planning.

In Penn Central Transportation

Company v. City of New York, 438 U. S. 104 (1978), this court established unequivocally that "police power" activities, also known as "regulation", may result in an unconstitutional taking of property under the Fifth and Fourteenth Amendments of the United States Constitution. Although the court ultimately determined that no taking had occurred in the case because the plaintiff had been able to realize its "primary" expectation for use of the property, the court affirmed the principles and standards first established in Pennsylvania Coal Co. v. Mahon, 260 U. S. 393, 415 (1922): "when regulation goes too far it will be recognized as a taking." The court variously stated the standards for regulatory takings. Characterizing taking claims as "essentially ad hoc, factual inquiries", the court stated that the validity of allegedly confiscatory

regulations would depend upon "whether the interference with appellants' property is of such a magnitude that 'there must be an exercise of eminent domain and compensation to sustain [it].' [Citations omitted]. That inquiry may be narrowed to the question of the severity of the impact of the law on the appellant's parcel...." 438 U. S. at 136. Inquiry would also proceed into "the extent to which the regulation has interfered with distinct investment-backed expectations." Id. at 124. Finally, the court stated that constitutionally valid regulations might become confiscatory should the use of the land cease to be "economically viable." Id. at 138, n. 36. These various statements of the standards for inverse condemnation are organized under the principle of fundamental "fairness and justice" first articulated in the

decision of Armstrong v. United States, 364 U. S. 40, 49 (1960), holding that the just compensation clause "was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."

In Agins v. City of Tiburon, 447 U. S. 255 (1980), this court again considered the question of regulatory takings. Again, the standards were clearly stated: when regulation "denies an owner economically viable use of his land", it constitutes a taking. Id. at 257 (1980), citing Penn Central Transportation Company, supra, 438 U. S. at 138, n. 36. The Court went further to identify the method of analyzing regulations under the Fifth Amendment's Just Compensation Clause. Plaintiffs had claimed that the designation of their

property for open space and low density residential use constituted inverse condemnation. The matter was decided on demurrer. The Court concluded that the ordinance under California law allowed a viable use on its face, viz., the construction of one residential unit per five acres. Since the plaintiffs had not submitted a development application or otherwise caused the zoning ordinance to be applied to their property, the Court would not look beyond the face of the ordinance.

The Agins requirement that landowners bring plans and ordinances to bear on development proposals might be regarded as exhaustion of administrative remedies or, alternatively, ripeness for judicial review. The challenge in Agins was to the face of the ordinances. Plaintiffs were unsuccessful because they failed

to have the ordinance applied to their intended use of the property. Had they done so and had the application of the ordinances deprived them of all economically viable uses of the property, a taking would have occurred. Where a landowner undertakes such steps, the reviewing court must go beyond the face of the ordinances to consider all the factual circumstances in order to determine whether a taking has occurred. The opinion of the Ninth Circuit in the instant case reverses the logic of Agins by concluding that events after the enactment of the plan and ordinances were irrelevant.

In the instant case, the enactment of the 1973 comprehensive plan by the City, which restricts the use of the petitioners' lands, is only one allegation in a series of transactions by city officials resulting in the confiscation of the property. The

reviewing court must determine the collective impact of regulatory activities in deciding whether a taking has occurred. Under Oregon law, the comprehensive plan is the controlling land use document and inconsisting zoning ordinances must fail. Baker v. City of Milwaukie, 217 Or. 500, 513-14, 533 P. 2d 772 (1975). The 1973 comprehensive plan enacted by the City was effective upon its adoption and remained in effect until replaced by a revised plan. Or. Rev. Stat. 197.275(1) (1977 Rep. Pt.), repealed 1981 Or. Laws, c. 748, Section 56. (In this regard, the opinion misstates Oregon law in presuming that the comprehensive plan for the City was not "final".)

Under Oregon law, the comprehensive plan map and the policy statements contained in the plan must be taken together in determining the effect of the

plan on a particular parcel. Green v. Hayward, 275 Or. 693, 552 P. 2d 815 (1976). The 1973 plan contained development guidelines which determined residential density under the plan. Those portions of the petitioners' lands which were not designated as open space on the plan map could be used for residential purposes only as set forth in the development guidelines. The guidelines required the installation of either sanitary sewers or septic tanks which complied with state regulations prior to residential development. Consultants for the petitioners submitted affidavits demonstrating that the petitioners' lands could not be used for subsurface sewage disposal because of poor soil characteristics and hence could not be profitably developed for residential use without the installation of sanitary sewers. The affidavits also concluded

that agricultural or forestry production on the property was not a viable economic use.

The landowners made several attempts to obtain sewer service for their property. The City, on the other hand, publicly advocated a regional classification which would have prevented the installation of sewers to the property. Petitioners successfully opposed the classification, leading to the reclassification of the City as an urban area on the regional map. The petitioners also attempted to withdraw their lands from the City in order to obtain sewer service. The City oppossed such efforts. The City further delayed the adoption of a facilities plan, which would have provided for city-wide sanitary sewers.

Petitioners went beyond these efforts, however, and submitted development

applications under the City's ordinances. The City refused to accept such applications and, further, extended a moratorium to include subdivision proposals.

These facts bear no resemblance to those in the Agins decision. Under the facts before the Court, petitioners have done every act within their power to apply the comprehensive plan and ordinances of the City to their property. They retained consultants to analyze the development guidelines in the City's plan. They attempted to obtain sewer service on several occasions. Finally, they submitted development applications in order to "test" the application of the City's plan and ordinances.

The Ninth Circuit's opinion forecloses constitutional review of most, if not all, land use regulations, contrary to this Court's directives. It would be a rare

plan or ordinance indeed that did not arguably permit some use of the land. Surely Agins was not intended to establish a factual threshold against which other ordinances and plans can be measured.

If federal courts will not look beyond the face of the ordinance, the municipal duty to avoid confiscatory regulation can be satisfied merely by patent designation of land for some arguably viable use. Municipalities will be free thereafter to adopt conflicting regulations, deny consistent development applications or otherwise abuse the police power with impunity.

The Ninth Circuit's opinion will undoubtedly have an impact on state court interpretation of the federal constitution and, in all probability, the state constitution. Article I, Section 20 of the Oregon Constitution has been determined to

be the "mirror image" of the Fifth Amendment's Just Compensation Clause. Lincoln Loan Co. v. State Highway Comm., 274 Or. 49, 52, n. 2, 545 P. 2d 105 (1976). In Fifth Avenue Corp. v. Washington County, 282 Or. 591, 614, 581 P. 2d 50 (1978), the Oregon Supreme Court attempts to formulate its own standard for regulatory takings, stating that a taking may occur when there are no "economically feasible private uses" remaining under the applicable plan classification. This formulation is itself the subject of debate. See generally, Morgan & Shonkwiler, Regulatory Takings in Oregon: A Walk Down Fifth Avenue Without Due Process, 16 Willamette L. Rev. 591 (1980); Leeson & Sullivan, Property, Philosophy and Regulation: The Case Against a Natural Law Theory of Property Rights, 17 Willamette L. Rev.

527 (1981). In view of the pervasiveness of land use planning in the State of Oregon, federal constitutional provisions which condition police power enactments should be carefully construed by the federal courts in order to avoid adverse impacts on the State's attempts to strike a balance between private property rights and public welfare.

2. Certiorari should be granted to decide unsettled law concerning the liability of municipalities for temporary takings, the appropriateness of compensation for confiscatory regulations under the Fifth and Fourteenth Amendments, alternatively, under 42 USC §1983, and the duty to exhaust State administrative and judicial remedies before a federal court will exercise jurisdiction over a regulatory taking claim.

This case presents unique facts which

will enable this Court to decide important principles of law relating to the exercise of federal jurisdiction over a claim brought pursuant to the Fifth and Fourteenth Amendments, alternatively pursuant to 42 USC §1983, involving land use regulations. The following issues derive from the Ninth Circuit's interpretation of federal law applied to the facts of the case.

(1) Interim damages for confiscatory land use regulations. The opinion below apparently identifies all transactions after the adoption of the 1973 plan with petitioners' claim for a "temporary taking." The Court relies upon a footnote in the Agin decision directed toward the City's alleged "precondemnation activities." (The City had initiated eminent domain proceedings and abandoned those proceedings within one year.) This Court held that "good faith planning activities" during

the pendency of eminent domain proceedings would not amount to a taking "absent extraordinary delay." 447 U. S., supra, at 262, n. 9. Without analysis, the Ninth Circuit concludes that the facts in the instant case "do not come within the narrow exceptions enumerated in Tiburon." Opinion, p. 2.

The Ninth Circuit's expansion of the principles stated in Agins swallows the concept of regulatory taking. Had the Court of Appeals taken cognizance of Justice Brennan's dissenting opinion in San Diego Gas & Electric Co. v. City of San Diego, 450 U. S. 621 (1981), as urged by petitioners, it could not have ruled as it did. As in Agins, that case arose out of the regulatory activities of the defendant municipality. Justice Brennan would have reached the merits of the case to decide the question of whether

compensation was an appropriate remedy for confiscatory land use regulation. Under Brennan's analysis, the just compensation provisions of the Fifth Amendment are self-executing: once a taking has occurred, compensation is due.

In reaching this conclusion, Justice Brennan apprehended a fundamental characteristic of regulatory taking cases: unlike the effects of a municipality's physical dominion over property, confiscatory impacts of regulatory activities can be overcome in most instances by the enactment of amendatory regulations. Mere invalidation of confiscatory regulation, Brennan reasoned, does not provide the fundamental protection inherent in the Fifth Amendment's guaranty that property shall not be taken without just compensation. In fact, confiscatory

regulations can be amended at the whim of the municipality. In keeping with this analysis, Brennan would have offered municipalities the option of rescinding confiscatory regulations and paying interim damages in lieu of instituting eminent domain proceedings to acquire the fee interest. A plurality of the Court in San Diego Gas, joined by Justice Rehnquist in a concurring opinion, held that the Court did not have jurisdiction over the taking claim because the issue of a taking had not been finally decided by the State of California. However, Justice Brennan's analysis was followed in the case of Hernandez v. City of Lafayette, 643 F. 2d 1188 (5th Cir. 1981), cert. denied, 102 S. Ct. 1251 (1982).

The concept of temporary taking is inextricably bound with the issue of compensation for deprivation of property

rights. Federal and state courts will continue to wrestle with the problem of subsequent enactments which modify or negate the confiscatory impacts of previous regulation. The Court should take this opportunity to establish guidelines for the review of regulatory taking cases.

(2) Relationship between exhaustion of administrative remedies and exercise of federal jurisdiction. Once an amendatory ordinance is enacted, the issue arises as to the effect on a pending taking claim in federal court premised upon previously confiscatory regulations. Several subsidiary questions arise. Where the ordinance arguably provides for development rights, must the property owners have the regulations applied to their property in order to continue litigation under the principles announced

in Agins? Conversely, if the property owners do engage in administrative or judicial proceedings to challenge or determine the effect of the new regulation, will their participation negate a claim for interim damages? Alternatively, must the federal court abstain from deciding the federal questions until the effect of the new regulation can be determined?

In the instant case, amendatory regulations were not enacted until seven years after the adoption of confiscatory regulations by the City of Happy Valley. The federal district court would have abstained because of pending administrative proceedings before the Land Conservation and Development Commission concerning the validity of the City's planning efforts under the doctrine of Railroad Commission v. Pullman Co.,

312 U. S. 496, 61 S. Ct. 643 (1941). The Ninth Circuit's opinion makes no express reference to the enactment of the 1980 comprehensive plan. The opinion, however, implies that subsequent proceedings have no effect on the underlying taking action. It further intimates that the petitioners' participation in such proceedings adversely affects their temporary taking claim.

If this Court adopts Justice Brennan's dissent in San Diego Gas, the only effect of an amendatory plan and ordinances, where the period of deprivation of property rights has been substantial, should be to fix the time period for analysis of the "temporary taking" claim. Landowners who have had their property rights confiscated by municipal regulations and who have exhausted their administrative remedies under such enactments should not be required to await prospective local

legislative changes before prosecuting a taking claim in federal court. To do so would be to jeopardize their claim altogether, insofar as the statute of limitations would presumably run from the date of enactment of the confiscatory regulations.

In this case, petitioners chose to contest the City's new plan and ordinances before the Land Conservation and Development Commission as contrary to state law rather than to have the plan and ordinances apply to specific development proposals. Public policy supports this position, in that landowners should not be required to proceed under a plan and ordinances which are in conflict with state law simply to preserve federal constitutional rights. Apparently no appellate court has considered this aspect of the taking question. There is

precedent for petitioners' course of action under Sixth Camden Corp. v. Township of Evesham, 420 F. Supp. 709 (D. N. J. 1976). The plaintiff therein succeeded in overturning a municipal ordinance on state law grounds during the pendency of a federal taking action. The federal district court authorized a trial on the matter of whether a temporary taking had occurred, notwithstanding the fact that the plaintiff had obtained development rights in the interim. See also Gordon v. City of Warren, 579 F. 2d 386 (6th Cir. 1978); Barbaccia v. County of Santa Clara, 451 F. Supp. 260 (N. D. Cal. 1978). Applied to the facts of the instant case, should the City's plan and ordinances fail under state law, the period for the temporary taking claim would be extended to the time that the City adopts complying plans and

ordinances. Such extension would be accomplished through proceedings on supplemental pleadings or through the severance of the liability issue from the damages issue in the taking claim.

The alternative available to the District Court would be to abstain during the pendency of state proceedings on the validity of the plan and ordinances. Until recently, the Ninth Circuit almost invariably abstained from reviewing taking challenges to land use regulations on the ground that land use was a sensitive area of social policy. This blanket abstention doctrine was seldom accompanied by an analysis of which issues of state law remained undecided in the context of taking claims. See, e.g., Rancho Palos Verdes Corp. v. City of Laguna Beach, 547 F. 2d 1092 (9th Cir. 1976); Newport Investments,

Inc. v. City of Laguna Beach, 564 F. 2d 893 (9th Cir. 1977); Sederquist v. City of Tiburon, 590 F. 2d 278 (9th Cir. 1978); Isthmus Landowners Assoc. Inc. v. State of California, 601 F. 2d 1087 (9th Cir. 1979); but see American Savings & Loan Assoc. v. County of Marin, 653 F. 2d 364 (9th Cir. 1981). The position of the Ninth Circuit contrasts with that of other circuits, which have undertaken the review of constitutional claims related to land use regulation. See, e.g., Hernandez v. City of Lafayette, supra; Nasser v. City of Homewood, 671 F. 2d 432 (11th Cir. 1982); Heritage Farms Inc. v. Solebury Township, 671 F. 2d 743 (3rd Cir. 1982). The Supreme Court should take this opportunity to determine the parameters of the abstention doctrine in the context of regulatory taking claims.

(3) Application of 42 USC §1983.

Petitioners also alleged that the conspiratorial acts of the City and its officials in restricting petitioners' lands violated 42 USC §1983. The Ninth Circuit's opinion below makes no reference to the civil rights claim even though the matter was argued in the briefs. In Lake Country Estates, Inc. v. Tahoe Regional Planning Agency, 440 U. S. 391 (1979), this Court acknowledged that a claim for relief would lie against the agency for an alleged deprivation of property rights protected by the due process clause of the Fourteenth Amendment. The relationship between a direct constitutional claim under the Fifth and Fourteenth Amendments and a derivative claim premised upon §1983 has not been decided by this Court. Some circuits have held that a §1983 claim is the exclusive method for reviewing

alleged constitutional deprivations. See, e.g., Turpin v. Mailet, 579 F. 2d 152 (2nd Cir. 1978); Owen v. City of Independence, 589 F. 2d 335 (8th Cir. 1978); see generally Kramer, Section 1983 and Municipal Liability: Selected Issues Two Years After Monell v. Department of Social Services, 12 Urban Law. 232, 233-240 (1980).

The effect of a Section 1983 claim on federal court abstention also remains unresolved. In Heritage Farms, Inc., supra, the Third Circuit found the presence of civil rights claims to be the basis for the exercise of federal jurisdiction in overruling the District Court's decision to abstain because the claims centered around land use.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the

judgment and opinion of the Ninth Circuit.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH DISTRICT

MAS FUJIMOTO, DELMER EISERT, ROBERT and AGNES GUY, Plaintiffs-Appellants, vs. CITY OF HAPPY VALLEY, a municipal corporation, et al., Defendants-Appellees.	No. 80-3158 D.C.# CV 78-476 MEMORANDUM

Appeal from the United States District Court for the District of Oregon
James A. Redden, District Judge, Presiding
Argued and submitted September 10, 1981

Before: SCHROEDER and NELSON, Circuit Judges, and JAMESON*, District Judge

Plaintiffs argue that an alleged deprivation of rights to develop their property following passage by the Oregon

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* Honorable William J. Jameson, Senior United States District Judge for the District of Montana, sitting by designation

legislature of the Comprehensive Land Use Statute of 1973[1/] amounts to a taking of that property by the City of Happy Valley for a public use without compensation, in violation of the fifth and fourteenth amendments.

The comprehensive plan covering plaintiffs' property has not yet become final. Throughout the course of this litigation, plaintiffs have simultaneously sought an "urban" classification through state administrative proceedings. The city has consistently advocated a classification which would limit residential development to a lesser density than that desired by plaintiffs. Plaintiffs urge that the failure to adopt the higher density urban classification

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1/ S.B. 100, currently codified at Or. Rev. Stat. Ch. 197 (1977).

constitutes a permanent or at least a temporary taking, without the compensation required by the fifth and fourteenth amendments.

The district court abstained under the doctrine enunciated in Railroad Commission v. Pullman Co., 312 U.S. 496, 61 S. Ct. 643 (1941), as applied by this court in Rancho Palos Verdes Corp. v. City of Laguna Beach, 547 F. 2d 1092 (9th Cir. 1976). The district court was of the view that abstention was appropriate because of the importance and difficulty of state law questions regarding the extent of the property rights allegedly interfered with by the regulation.

At the time that the district court considered the case, the law with respect to inverse condemnation by government regulation was in its infancy. However,

the Supreme Court has since decided Agins v. City of Tiburon, 447 U.S. 255 (1980). That decision compels the conclusion that plaintiffs have failed to state a claim upon which the federal court can grant relief. The complaint must therefore be dismissed.

Under Tiburon, plaintiffs cannot maintain that they are constitutionally entitled to an urban classification. The classification advocated by the city is essentially the same as that considered by the Supreme Court in Tiburon. The Court held that a zoning ordinance which so limited residential development did not amount to a taking. Thus even if the classification ultimately adopted is that advocated by the city, there will be no taking.

Plaintiffs also claim damages for a temporary taking, alleging that delays in

approval of the comprehensive plan have prevented any development because adequate sewers cannot be installed under the interim plan. The Supreme Court also dealt with this issue in Tiburon, stating that absent bad faith or unreasonable delay, a city's planning activities, even those which culminate in an actual condemnation, do not in and of themselves amount to a taking. Plaintiffs' allegations with respect to the city's refusal to install sewers as a means to limit development density, and its delays in connection with approval of the plan -- many of which are directly attributable to appellants' participation in the administrative process -- do not come within the narrow exceptions enumerated in Tiburon.

The matter is remanded to the district court with instructions to dismiss the complaint.

APPENDIX B

B-1

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

MAS FUJIMOTO; DELMER EISERT; and ROBERT AND AGNES GUY,	
Plaintiffs,	Civil No. 78-476
v.	ORDER
CITY OF HAPPY VALLEY, a municipal corporation, et al.,	
Defendants.	

Plaintiffs have filed objections to Judge Leavy's Findings and Recommendation dated November 26, 1979. After a de novo review, I agree with Judge Leavy that Pullman[1/] abstention is appropriate in this case.

1/ Railroad Commission of Texas v. Pullman Co., 312 U. S. 496 (1941). Under Pullman abstention, the federal court retains jurisdiction but stays the action in order to provide the state court the opportunity to decide the underlying questions of state law.

In Canton v. Spokane School District, No. 81, 498 F. 2d 840, 845 (9th Cir. 1974), the Court held that Pullman abstention is appropriate when:

> (1) The complaint touches a sensitive area of social policy upon which federal courts ought not to enter unless no alternative to its adjudication is open;
>
> (2) Such constitutional adjudication plainly can be avoided if a definitive ruling on the state issue would terminate the controversy; and
>
> (3) The possibly determinative issue of state law is doubtful.

This case meets the three part Canton test.

Sensitive Area of Social Policy.

Plaintiffs contend that defendants have deprived them of the right to use and develop their land as an economic commodity. They seek monetary damages based on the theory that the totality of

defendants' actions constitute a "taking" of their property.

Plaintiffs' complaint raises land use planning questions. It is settled law that land use planning is a sensitive area of social policy for purposes of the Pullman doctrine. Isthmus Landowners Ass'n v. State of California, 601 F. 2d 1087 (9th Cir. 1979).

Avoidance of Constitutional Adjudication

Plaintiffs contend that their complaint does not raise questions of state law, but is framed squarely on federal law. They contend that they have an inherent right to use and develop their land as an economic commodity, and that the Fifth Amendment to the United States Constitution presumes such rights, subject only to the nuisance doctrine, and a limited right of the states to legislate

the manner in which property is used in order to promote the public welfare. Plaintiffs do not contend that defendants' actions necessarily violated state land-use laws or regulations, but contend only that the cumulative effect of defendants' actions, regardless of their lawfulness, constituted a "taking" under the Fifth Amendment for which plaintiffs are entitled to compensation. Therefore, argue plaintiffs, there are no state law questions involved in this case.

While the issue of what constitutes a taking under the Fifth Amendment is a federal question, federal courts look to state law to determine what property rights exist. Richmond Elks Hall Ass'n v. Richmond Development Agency, 561 F. 2d 1327, 1330 (9th Cir. 1977). The same is true of property rights under the due process and equal protection clauses of the Fourteenth

Amendment. Rancho Palos Verdes Corporation v. City of Laguna Beach, 547 F. 2d 192 (9th Cir. 1976). Therefore, whether a taking has occurred depends upon whether, under state law, plaintiffs have a right to the unrestricted development of their land as an economic commodity. Furthermore, if such right does exist, the question remains whether they are entitled to money damages resulting from the deprivation of those rights.

Unsettled Nature of State Law.

Plaintiffs contend that they have a right to inverse condemnation whether or not the taking is temporary or permanent.2/ There is no question that, under Article I,

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2/ Plaintiffs are seeking permission to develop their land through state agency proceedings. Even if they are successful in obtaining the right to develop their land, they argue they are entitled to damages for the ten year period during which they were denied that right.

section 18 of the Oregon Constitution, the designation of certain property for future public use can constitute a taking if, in the interim, the property owner is deprived of all economically feasible uses of the property. Fifth Avenue Corp. v. Washington County, 282 Or. 591, 610 (1978). However, the state courts have yet to address whether a temporary loss of the right to develop property gives rise to an action for inverse condemnation. Furthermore, the Oregon Supreme Court has not expressly stated that Oregon's constitutional taking clause is a mirror-image of its federal counterpart. See Stephens v. Tielsch, 502 F. 2d 1360 (9th Cir. 1974).

Here, the outcome of the state proceedings may render plaintiffs' claim under the United States' Constitution moot. Under Pullman abstention, plaintiffs have the opportunity of submitting all the

state and federal questions to the state court for final adjudication, or reserving the federal question for decision in this court should the state proceedings not dispose of it. Given the nature of the subject matter involved in this case, and the possibly dispositive, though unsettled issues of state law involved, Pullman abstention is appropriate.

Judge Leavy's Findings and Recommendation is affirmed. It is hereby ordered that this court retain jurisdiction but stay the federal case pending adjudication of the state law questions in state court.

Dated this 16th day of April, 1980.

/s/James A. Redden
James A. Redden
United States District
Judge

APPENDIX C

C-1

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MAS FUJIMOTO, DELMER EISERT, ROBERT and AGNES GUY,	)	
Plaintiffs-Appellants,	)	No. 80-3158
vs.	)	ORDER
CITY OF HAPPY VALLEY, a municipal corporation, et al.	)	
Defendants-Appellees.	)	

Before: SCHROEDER and NELSON, Circuit Judges, and JAMESON,* District Judge.

The panel as constituted above has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc,

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* Honorable William J. Jameson, Senior United States District Judge for the District of Montana, sitting by designation.

and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

APPENDIX D

D-1

EXCERPTS FROM PLAINTIFFS' COMPLAINT

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

MAS FUJIMOTO, DELMER EISERT, ROBERT and AGNES GUY,	
Plaintiffs,	Civil No. 78-476
vs.	COMPLAINT FOR INVERSE CONDEMNATION AND CIVIL RIGHTS DAMAGES
CITY OF HAPPY VALLEY, et al	
Defendants.	DEMAND FOR JURY TRIAL

Plaintiffs allege:

1

This is an action for compensatory, consequential and exemplary relief pursuant to Title 42 USC §§1983, 1985(3) and 1986; and arising under the provisions of the constitution and laws of the United States, as more fully set forth hereinafter.

24

The City of Happy Valley was incorporated in 1965. The purpose of the incorporation was defensive and was designed to insulate lands incorporated from development pressures and to prevent annexation of the territory by the City of Portland.

31

All residences within the City of Happy Valley utilize septic tanks for sewage disposal. Prior to incorporation of the city, residents of the area became aware of pollution of ground water in the Kellogg Creek drainage basin caused by malfunctioning septic tank systems. The Clackamas County Health Department repeatedly informed the city and the Department of Environmental Quality of malfunctioning septic tanks and the health hazards involved. The USDA Soil

Conservation Service conducted soil tests within Happy Valley in 1972 and concluded that lands within the city were generally unsuitable for subsurface sewage disposal.

32

In December of 1972 and in March of 1973, the Department of Environmental Quality conducted sanitary surveys within the city and concluded that a serious public health hazard existed and recommended that sewers be installed to correct the problem. In March 1973, the city council commissioned an engineering consultant firm to conduct soil surveys to determine alternative remedies to the installation of sanitary sewers. In March 1974, the City of Happy Valley transmitted its own report on sewage disposal problems, which recommended that health hazards could be removed without the installation of sanitary sewers. The

City of Happy Valley requested that the DEQ defer enforcement actions against individual owners of failing septic tanks within the City of Happy Valley.

33

The City of Happy Valley conducted a tour of the city for DEQ officials in the summer of 1975 in preparation for a public meeting between DEQ officials and city residents. The public meeting among DEQ officials, Happy Valley officials and Happy Valley residents occurred on September 15, 1975. Thereafter, it was determined that Happy Valley would pursue a facilities plan under an Environmental Protection Agency grant as a means of remedying sewage disposal problems.

34

Defendants acted individually and in concert, under color of state law, to prevent the enforcement of state health

regulations against owners of failing septic tank systems within the City of Happy Valley. Individual Defendants used their offices to influence public officials charged with the maintenance of water quality to postpone an area-wide solution to Happy Valley's sewage treatment problems in order to prevent urban development within the city.

37

The City of Happy Valley failed to complete its facilities plan in accordance with the projected schedule. The Environmental Quality Commission (hereinafter "EQC") by order of May 27, 1977, directed the City of Happy Valley to complete its facilities plan within six months of the land use designation by CRAG, which occurred on May 26, 1977.

38

The City of Happy Valley failed to

complete its facilities plan within the time schedule fixed by EQC order. The city continued to maintain a public position that the facilities plan could not be completed until allegedly conflicting policy directives among state agencies could be resolved. Mayor Robnett requested a time extension on December 6, 1977, until June 1, 1978, for completion of the facilities plan because of unresolved land use density questions. By order of February 17, 1978, the EQC imposed a third schedule for the completion of the facilities plan by June 1, 1978, or six months following the adoption of essential land use plans by the city. The city has not followed the projected schedule and will not have completed its facilities plan by June 1, 1978.

39

Defendants acted individually and in concert, under color of state law, to delay selection of a comprehensive solution to sewage disposal problems within the city through the facilities planning process. Individual Defendants have used their offices to manipulate public sentiment against installation of sanitary sewers to remedy city-wide health problems. Defendants further obtained a "rural" regional land use designation for the city in order to prevent installation of sanitary sewers, as will be set forth more fully below.

40

In March 1970, Mayor Robnett addressed the planning commission to request that stricter development controls be formulated in order to retain the rural atmosphere of the city. The city adopted a zoning ordinance on

August 10, 1970, which established a single use district (R-20) for single-family residences. All of the property presently belonging to plaintiffs was classified as R-20.

41

In 1968 the city council directed the planning commission to proceed with the development of a comprehensive plan for the city. The consultant firm of CH2M was retained by the city in March 1972 to formulate a comprehensive plan. The comprehensive plan was adopted unanimously at a special meeting of the city council on May 29, 1973. Revisions were adopted in December 1973.

42

The comprehensive plan for the city identified 430 acres of land as "existing development"; 675 acres as farm land or potential development; and 275 acres as

open space (park, school and undisturbed hillside). The comprehensive plan projected an ultimate population density of over 6,000 persons and assumed that the city might ultimately be sewered. The plan also prescribed minimum lot sizes on the basis of soil suitability for sub-surface sewage disposal. Minimum lot sizes were developed on the assumption that sewers would be ultimately installed. The plan contemplated the development of a planned unit development (PUD) ordinance.

43

Substantial portions of Plaintiffs' property were classified as "open space" on comprehensive plan maps and the remainder was classified as "suitable for development."

44

The planning commission considered development of a PUD ordinance on June 7,

1971, and passed a motion endorsing such an ordinance in concept on October 4, 1971, with the understanding that the ordinance would be developed after joint discussion with the city council. The city council discussed the adoption of a PUD ordinance on November 22, 1971, wherein the city attorney recommended that no PUD ordinance be developed until sanitary sewers were installed. The City of Happy Valley has not adopted a PUD ordinance.

45

Plaintiffs' property is generally unsuitable for subsurface sewage disposal. Eighty-one percent of the sites evaluated since 1973 for septic tank approval in Section 27 have been denied under subsurface sewage disposal requirements adopted by the DEQ; 85% of the sites in Section 35 have been denied since 1973.

46

In failing to provide for alternative sewage disposal methods for residential use in the comprehensive plan for the city and in failing to provide for cluster housing through a PUD ordinance, Defendants have denied Plaintiffs all use of their property for residential purposes.

47

The City of Happy Valley adopted a building code and incorporated the 1955 Clackamas County subdivision ordinance as ordinance 1 in 1965. During the 1973 legislative session, Oregon substantially revised its subdivision laws. Clackamas County subsequently adopted a new subdivision ordinance, which was reviewed by the planning commission for the city on September 24, 1973. The planning commission approved the ordinance in concept and resolved to revise the city

ordinance accordingly. The planning commission initiated subdivision ordinance revision on March 10, 1975. The City of Happy Valley has never adopted a revised subdivision ordinance.

48

The city contracted with Clackamas County for review of subdivision plat applications and building permit applications. The planning commission for Happy Valley and the city council also reviewed these applications and was responsible for approval of subdivision plats. Happy Valley has approved two subdivision applications since its incorporation. Since 1970 (excluding 1978), the city has issued 66 building permits, constituting 14.4% of the city's housing stock.

50

The city adopted a partitioning

ordinance governing the division of land into three or fewer parcels on June 24, 1976 (Ordinance 65). On September 7, 1977, the city council enacted a moratorium on partitioning of lands within the city and suspended operation of Ordinance 65 until the revised comprehensive plan for the city was adopted. Upon inquiry by Plaintiffs, the city revised the moratorium resolution to apply to the subdivision of land on May 2, 1978.

51

Plaintiff Mas Fujimoto submitted a subdivision proposal to the city council on February 14, 1972, which proposal was not acted upon by the city. Mr. Fujimoto submitted an application for subdivision on February 23, 1976, and received an "advisory opinion" by the planning commission that the application was improper. Plaintiffs Robert and Agnes Guy

requested the city's approval for annexation to Clackamas County Service District No. 1 for the purpose of obtaining sanitary sewer service for their property, which request was denied.

52

Each of the Plaintiffs submitted two sets of subdivision proposals drafted in accordance with the specifications for preliminary plats under the Clackamas County subdivision ordinance at the meeting of the Happy Valley planning commission on March 27, 1978. One set of tentative plans detailed standard subdivision plats while the second set outlined planned unit developments. The planning commission deferred review of the plans pending judgment of the city council. The Happy Valley city council refused to accept the proposals on April 3, 1978, and revised the moratorium

on partitioning to include subdivisions on May 2, 1978.

53

Defendants acted individually and in concert, under color of state law, to thwart residential and commercial construction within the city limits of Happy Valley through a pattern and practice of denying subdivision and building permit applications and by the failure to revise and update the city's subdivision ordinance. Defendants have further imposed a moratorium on development within the city which precludes approval of subdivision applications submitted by Plaintiffs.

54

The City of Happy Valley lies within an urbanizing corridor on the west by Interstate Highway I-205, on the north by the City of Portland, and on the south by

the Sunnyside district, an unincorporated area which has experienced rapid residential development. The city is within close commuting distance of the Clackamas River industrial district, the Kaiser Hospital complex and the proposed regional shopping center known as the Town Center. The city has a full range of urban services, with the exception of public transit and sanitary sewers. The city receives state tax revenues on the basis of its certification that it provides at least five municipal services.

55

In May 1975, CRAG initiated the process of adopting a regional land use framework element. All areas of the metropolitan Portland region were classified as urban areas, rural areas or natural resource areas. Classification was made on the basis of projected

populations for subareas of the region and upon housing densities. The City of Happy Valley was mapped as an urban area.

56

On September 24, 1975, a public meeting was held in Happy Valley to present the regional classifications. By letter of November 17, 1975, the city requested a new classification permitting rural residential uses. The CRAG staff subsequently changed its recommendation that Happy Valley be declared an urban area and the city was classified as rural on the draft regional map. From March through December of 1976, the CRAG Board of Directors conducted mark-up sessions concerning the land use framework plan. Throughout the mark-up sessions, the City of Happy Valley advocated a rural classification for the city and urged residents to support its position before

the regional body. The city urged that an urban classification would engender rapid urbanization for the city and force compulsory sewering to remedy existing sewage disposal problems. On December 16, 1976, the CRAG Board of Directors classified Happy Valley as a "study area" and authorized the preparation of a consultant's report to determine the issue of whether Happy Valley should be declared urban or rural. Plaintiffs participated throughout the mark-up sessions and advocated an urban classification for the city.

57

On December 22, 1976, CRAG adopted the land use framework element of the regional plan. The text of the element provided that all cities within the regional urban growth boundary were to be classified as immediate growth areas (in contrast to future urbanizable areas).

All other cities in the region were classified as urban areas on the regional map. The framework element text also provided that sewers could not be extended into areas classified as rural unless "required to alleviate a public health hazard or water pollution problem in an area officially so designated by the appropriate state agency."

58

The consultant's report on Happy Valley concluded that an urban designation for the city would better comply with CRAG objectives than a rural designation. The CRAG staff recommended that Happy Valley be declared a future urbanizable area on the regional map. On April 21, 1977, CRAG held a public hearing concerning the consultant's report. Defendant officials of Happy Valley and other residents presented orchestrated

oral testimony in support of a rural classification, alleging that city residents would be forced to accept sanitary sewers and would be burdened with the costs of urbanization. Plaintiffs presented oral and written testimony in behalf of an urban classification. The CRAG Board of Directors deferred its decision until May 26, 1977, at which time Happy Valley was classified as rural on the regional map.

59

On July 21, 1977, Plaintiffs appealed the decision of the CRAG Board of Directors on grounds that the classification violated statewide planning Goals 2 (land use planning), 10 (housing), 11 (public facilities) and 14 (urbanization). By order of May 2, 1978, the Land Conservation and Development Commission invalidated the CRAG resolution declaring

Happy Valley as rural, rendering the city as unclassified under the regional plan.

60

Defendants acted individually and in concert, under color of state law, to obtain a rural classification for the city under the regional land use plan in order to prevent the urbanization of the city and the installation of sanitary sewers as an area-wide solution to the existing sewage disposal problems. Individual Defendants used their offices to manipulate public sentiment in behalf of a rural classification and influenced public officials charged with regional responsibilities to relieve city officials from land use responsibilities associated with the urbanization process.

61

In 1973, the Oregon Legislative

Assembly enacted SB 100, which created a Land Conservation and Development Commission and which required all cities and counties to adopt or revise comprehensive plans and implementing ordinances in order to comply with statewide planning goals promulgated by the agency within one year from the adoption of such goals. In December 1975, LCDC adopted fourteen statewide planning goals and accompanying guidelines.

62

In February 1976, the city requested a temporary planning extension in order to evaluate its comprehensive plan and ordinances for compliance with the statewide goals. The council appointed a citizens advisory committee to undertake the evaluation. In its initial report to the LCDC, the city determined that the urbanization goal was inapplicable because

the city was a rural residential area. LCDC granted a planning extension until October 1, 1976, to the city on the condition that it address the urbanization goal in its work program and compliance schedule.

66

By letter of October 14, 1977, the city council declared that a second vote on population density would be taken and distributed questionnaires to city residents. Out of 215 questionnaires returned, 63 ballots favored 2 1/2 acre lot sizes; 37 favored 1 1/2 acre lot sizes; 49 favored one acre lot sizes; 31 favored 3/4 acre lot size; and 33 specified "other." At the November 1977 meeting of the city council, the council adopted a 1.5 acre minimum average lot size for the city.

72

On August 18, 1977, Plaintiffs

petitioned the Portland Metropolitan Area Local Government Boundary Commission for withdrawal of their property from the City of Happy Valley for the purposes of obtaining sanitary sewer service from Service District No. 1. Plaintiffs requested the City of Happy Valley's approval of this action at the city council meeting of September 7, 1977. The city submitted the matter to a vote of participants in the public meeting of September 20, 1977, without explanation of the proposal and without providing an opportunity for Plaintiffs to explain the proposal to the public.

73

The City of Happy Valley opposed withdrawal from the city before the boundary commission during public hearings. The boundary commission staff report substantiated that Plaintiffs' properties

would be fully serviced upon withdrawal from the City of Happy Valley and annexation to the Service District. By Order of November 16, 1977, the boundary commission denied Plaintiffs' petitions without prejudice for the reason that CRAG had not acted upon the Plaintiffs' amendments to the regional plan.

74

In August 1977, Plaintiffs petitioned CRAG to amend its land use framework element map to redesignate their properties from rural to urban. The purpose of the proposed amendments was to enable Plaintiffs to withdraw land from the city in order to annex to Service District No. 1 to obtain sanitary sewer service. The City of Happy Valley opposed the amendments at the quasi-judicial hearings scheduled by CRAG, and the CRAG Board of Directors denied Plaintiffs' petitions

in December 1977.

75

Defendants have acted individually and in concert, under color of state law, to frustrate the attempts of Plaintiffs to withdraw land from the City of Happy Valley in order to obtain sanitary sewer service.

76

Soil characteristics of Plaintiffs' property renders the property unsuitable for agricultural or forestry production. Residential construction on Plaintiffs' property cannot be undertaken without adequate means of sewage disposal. Plaintiffs' property is unsuitable for subsurface sewage disposal, the only method of sewage disposal authorized under the existing comprehensive plan.

77

Defendants acting individually and

in concert have prevented Plaintiffs from acquiring alternative means of sewage disposal for their property. Consequently, Defendants have deprived Plaintiffs of all reasonable uses for the property. Plaintiffs continue to pay property taxes for the property.

78

Aforesaid acts of Defendants have deprived Plaintiffs of all value of their property in the following amounts:

Mas Fujimoto	$ 600,000
Delmer Eisert	$ 480,000
Robert and Agnes Guy	$ 600,000

79

Plaintiffs have suffered consequential damages in the amount of $30,000.

80

Said acts of Defendants were done maliciously, wantonly, for oppressive

reasons and in bad faith, and with the intent to injure and damage Plaintiffs, and Plaintiffs are entitled to punitive damages in the amount of $600,000.

A. First Cause of Action: Inverse Condemnation

82

Defendant City of Happy Valley, acting through Defendant officers and agents, have deprived Plaintiffs of all value of their property without compensating them therefor, in violation of the Fifth Amendment of the United States Constitution as incorporated by the Fourteenth Amendment.

B. Second Cause of Action: §1983

84

Defendants Robnett, Stuck, Cannard, Coats, Shaffer, Ross, Grady, Schneider, Quick, Gustaffson, Bye and Frey, acting under color of state law and municipal ordinance, have used their offices to

willfully, wantonly and maliciously deprive Plaintiffs of their rights and privileges to enjoy and use their property as secured by the constitution and laws of the United States, in violation of 42 USC §1983 and the Thirteenth Amendment of the United States Constitution.

E. Fifth Cause of Action: Fifth Amendment Injuries

Defendant City of Happy Valley, together with Defendants Robnett, Stuck, Cannard, Coats, Shaffer, Ross, Grady, Schneider, Quick, Gustaffson, Bye and Frey, acting individually and in concert, with malice and deliberate disregard of Plaintiffs' civil rights, have deprived Plaintiffs of their rights and privileges to use and enjoy their property as they see fit, in violation of the due process and equal protection clauses of the Fifth and Fourteenth Amendments of the United

States Constitution.

WHEREFORE, Plaintiffs pray for a decree:

(1) Awarding Plaintiffs the value of their property of which they have been deprived in the following amounts:

Mas Fujimoto	$ 600,000
Delmer Eisert	$ 480,000
Robert and Agnes Guy	$ 600,000

(2) Awarding Plaintiffs consequential damages in the amount of $30,000;

(3) Awarding Plaintiffs punitive damages in the amount of $600,000;

(4) Awarding Plaintiffs' reasonable attorneys' fees plus all costs and disbursements incurred herein; and

(5) Such other relief that the court may deem appropriate.

MORGAN & SHONKWILER

By /s/Terry D. Morgan
Terry Morgan
Of Attorneys for
Plaintiffs

EXHIBIT E

E-1

EXHIBIT 7
OF
PLAINTIFFS' MEMORANDUM OF LAW
IN OPPOSITION TO DEFENDANTS'
MOTION FOR SUMMARY JUDGMENT

Terry D. Morgan
MORGAN & SHONKWILER
2111 NE 43rd Avenue
Telephone: (503) 287-6676
Of Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

MAS FUJIMOTO; DELMER EISERT; and ROBERT and AGNES GUY,	)	Civil No. 78-476
Plaintiffs,	)	
vs.	)	AFFIDAVIT OF TERRY D. MORGAN
CITY OF HAPPY VALLEY, a municipal corporation, et al,	)	
Defendants.	)	

STATE OF OREGON)
: ss
County of Multnomah)

I, TERRY D. MORGAN, being duly sworn, do depose and state:

1. I am attorney for Plaintiffs in the above captioned matter.

2. Attached hereto as Exhibit A is the report of R. J. Frank & Associates, a real estate consultant firm retained by Plaintiffs for the purpose of appraising the impact of Defendants' regulations upon Plaintiffs' property. The exhibit consists of a letter from Mr. V. Hugh LeGall, a member of the Society of Real Estate Appraisers; and an unsigned report prepared by Curtis Richard Close, member of the American Institute of Planners. Mr. LeGall's letter, dated May 9, 1979, sets forth the methodology for determining the value of the option taken by the City on Plaintiffs' property. Mr. Close's report concludes that the City's present regulatory scheme precludes economic use of Plaintiffs' property.

Terry D. Morgan

SUBSCRIBED AND SWORN to before me this ____day of May, 1979.

Nelly Ponce
Notary Public for Oregon
My Commission Expires: 8/3/80

(NOTARIAL SEAL)

EXHIBIT A

R. J. FRANK & ASSOCIATES
6625 N.E. 82nd Avenue
P. O. Box 20517
Portland, Oregon 97220
(503) 255-0020

May 9, 1979

Mr. Terry Morgan, Attorney at Law
Morgan & Shonkwiler
2111 N.E. 43rd Avenue
Portland, Oregon 97213

Re: Fujimoto, Eisert, and Guy Properties
Tax Lots 100, 500, 1700, 1800, 1801
and 2300 in Section 35, T1S, R2E,
and Tax Lot 900, Section 27 CB,

T1S, R2E, W.M., in the City of Happy Valley, Multnomah County, Oregon.

Dear Mr. Morgan:

According to your request I have reviewed the information you supplied relating to the referenced properties, and I have considered the problem of valuing the loss to the owners that results from being deprived of the use of the property.

Mr. Close of our office has concluded that under the prevailing conditions no reasonable economic use remains to these properties. I have reviewed his work and concur in his opinion.

The method of estimating the value of the lost property rights is as follows:

1. Determine highest and best use.
2. Estimate by comparable land sales the market value of the subject immediately prior to the date of taking.

3. Using market value as a base, determine a fair rental for the property.
4. Estimate the fair price of an option on the property for a specified period of time, say one year.
5. The value of the loss is the present worth of the option payments for the number of periods the use of the property is denied.

Rental value is the standard method for estimating the worth of an option or other temporary transfer of real property rights.

I have made a preliminary investigation and analysis which allows me to state that highest and best use of the subject property is for a residential subdivision.

I have found and tabulated a number of comparable land sales. Within the time

available I have not been able to complete the analysis necessary to form an opinion about the fair market value of the property at the date of the taking. That information will be forthcoming.

Yours very truly,

R. J. Frank & Associates

/s/V. Hugh LeGall
V. Hugh LeGall, S.R.E.A.

VHL:na
encs.
Our No. 2186

HAPPY VALLEY - FUJIMOTO - EISERT PROPERTY ANALYSIS

These properties, identified as Tax Lots 100, 500, 1700, 1800, 1801, and 2300, Section 35, T1S, R2E, W.M., contain 91.92 acres in the south central area of the City of Happy Valley.

Topographically the property ranges from 370 feet in elevation at the southwest

corner of the Eisert property to a high of 655 feet on the east end of the Fujimoto property. Slopes vary from 2% to in excess of 25% in some areas.

Independent investigation by a soil scientist indicates the only area suitable for individual septic tanks and drainfields lies along the ridge running north and south at the east end of both parcels.

Although sewers are readily available in the area, the city has no plan for the provision of public sewers at this time.

Clackamas County standards require a minimum of two ares for individual disposal systems in soils exhibiting the characteristics of these soils.

A public water supply is available in the city.

Access to the buildable portions of the site would require construction of at least 2,000 feet of street with drainage and public water from 122-129th, before reaching the area suitable for development. Construction of a street system required to serve the approximately ten building sites would be in addition to the access road construction.

Assuming a higher than average grading cost due to the slope of the ground (with grades approaching 15%), and further assuming added costs to provide approved road drainage, it could cost in excess of $150,000 just to get to the building sites, without their frontage improvements. These costs would include providing a road to Standard Area II Drawing Number R5026G, plus a six inch waterline.

Although the City Comprehensive Plan Text refers to a Planned Unit Development as a desirable method of providing housing sites and open space, no enabling ordinance establishing standards has been adopted.

CONCLUSION:

Under conditions as they exist today, these properties have no reasonable, economic use for residential purposes. Without public sewers to serve those areas identified as unsuitable for septic tank and drainfields, these lands cannot be developed economically.

HAPPY VALLEY - GUY PROPERTY ANALYSIS

This property, identified as Tax Lot 900, Section 27 CB, T1S, R2E, W.M., lies in the northwest corner of the City of Happy Valley, on the slope of Mt. Scott.

Topographically the land is moderately steep to steep, with slopes ranging from 12% to in excess of 25%.

Those areas with slopes in excess of 25% are considered unsuitable for sewage disposal by individual septic tanks, according to DEQ rules. Slightly less than 20 acres (19.68±) of the 29.92 acre parcel are within that category.

The balance (about 10.24 acres) has a slope less than 25%, but exhibits soil characteristics which indicate those areas are not suitable for sub surface disposal systems. Identified characteristics include soil mottling, perched ground water and restrictive layers, which indicate the area is unsuitable for septic tanks or drainfields.

Although sewers are readily available in the area, the city has no plan for the

provision of public sewers at this time.

The area is currently limited to a minimum lot size of 1.5 acres per living unit, by city regulations.

The property will not support agriculture due to soils, slope and moisture.

A public water supply is available in the vicinity.

Access to the site from Idleman Road and View Drive is good.

CONCLUSION:

Until this property is provided with public sewers and a density of development is allowed which makes installation of those sewers economically feasible, this property has no economic use.

CERTIFICATE OF SERVICE

I hereby certify that on this_____ day of August, 1982, three copies of the Petition for Writ of Certiorari were mailed, postage prepaid, to Margaret Leek Leiberan and Stephen F. English, One Southwest Columbia, Portland, Oregon 97258, counsel for Respondents. I further certify that all parties required to be served have been served.

MORGAN & SHONKWILER, P. C.

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Counsel for Petitioners

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I HEREBY CERTIFY THAT THE FOREGOING IS A TRUE COPY OF THE ORIGINAL THEREOF.

Attorney for Respondents

Supreme Court, U.S.
FILED
DEC 3 1982
ALEXANDER L. STEVAS, CLERK

NO. 82-332

IN THE

Supreme Court of the United States

October Term, 1982

MAS FUJIMOTO, DELMER EISERT, ROBERT GUY and AGNES GUY,
Petitioners,

v.

CITY OF HAPPY VALLEY, et al,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether petitioners' "taking" claim is moot given respondent city's enactment in August, 1980 of an entirely new comprehensive plan and zoning ordinance which: (a) increases the permissible residential density on petitioners' properties beyond the density permitted at any time since petitioners acquired their properties; and (b) commits the city to extend sewer and other municipal services to petitioners' properties on a "timely, orderly and efficient" basis?
2. Whether a Federal question is presented by petitioners' claim that the city had an affirmative duty to increase the value of petitioners' land by: (a) providing higher density zoning; or (b) extending sewer and other municipal services?
3. Did the District Court correctly abstain from deciding this case where any federal claims may have been mooted by a statewide land use planning process in which respondent city is engaged, and where a federal court decision would be disruptive to state efforts to establish coherent land use policy for the Portland metropolitan area?

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EXHIBIT A

City of Happy Valley Comprehensive Plan, August 1980 ..... One Copy lodged with Office of the Clerk, U.S. Supreme Court

EXHIBIT B

City of Happy Valley, Oregon Land Development Ordinance No. 72 August, 1980 ..... One Copy lodged with Office of the Clerk, U.S. Supreme Court

NO. 82-332

IN THE

Supreme Court of the United States

October Term, 1982

MAS FUJIMOTO, DELMER EISERT, ROBERT GUY and AGNES GUY,

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinions of the District Court and Court of Appeals are unreported, and appear in Appendix B and Appendix C of the Petition, respectively.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition at p.2.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the Just Compensation Clause of the Fifth Amendment, the Due Process Clause of the Fourteenth Amendment, and 42 U.S.C. §1983 (1976) are set forth in the Petition at pp. 2-3.

STATEMENT OF THE CASE

This cause was decided on motion for summary judgment, so the allegations of the complaint, as supplemented by petitioners' affidavits in opposition to the motion, must be accepted as true.

Petitioners' Claim

Happy Valley, a suburb on the eastern edge of the Portland metropolitan area near the foothills of the Cascade mountain range, was incorporated in 1965. Its purpose for incorporating was to insulate itself from development pressures emanating from Portland or from annexation by Portland.

Each petitioner has, since 1970, owned undeveloped, unserviced property in Happy Valley. At all times prior to 1980, all non-commercial land in Happy Valley was zoned R/20. The minimum lot size in the R/20 zone was 20 thousand square feet, or roughly two dwellings per acre, maximum. The R/20 zone did not contemplate development, city-wide, at half-acre densities. Rather, lot sizes were to be calculated on a lot-by-lot basis, the size of lots depending upon the area required for septic tank drainfields. The 1973 Happy Valley Comprehensive Plan stated that it was the policy of the city to use septic tanks instead of sewers, and that the lot size policies "* * * will reduce the incidents of disposal field breakout and the possible resultant health problems." (1973 Comprehensive Plan, p. 6). Clackamas County, not respondents, determines drainfield requirements and, according to petitioners, the county "requires a minimum of two acres for individual disposal systems in soils exhibiting the characteristics of these soils." Petition, p. E-7.

Petitioners' properties allegedly could not be developed at economic residential densities because their soils require larger areas for septic tanks. Petitioners claim that, again because of poor soils, their properties cannot be put to economic agricultural or forest use.

Petitioners allege that various actions and decisions of respondents prior to filing of the complaint in May, 1978 prevented petitioners from developing their properties at economic residential densities and constituted a "taking" of their properties. The gravaman of the complaint is that respondents' decisions and actions, taken as a whole, prevented sewers from being extended in the city or to petitioners' properties. Without sewers, the complaint alleges, petitioners' lands cannot economically be developed residentially and have no other value.

Respondents moved for:

—dismissal or summary judgment on the grounds of either abstention or ripeness, pending the outcome of the statewide planning process;

—a stay of the proceeding pending determination of all state law issues in the state courts;

—dismissal or partial summary judgment on petitioners' inverse condemnation claim for failure to state a cause of action;

—dismissal for failure to join necessary parties, the Land Conservation and Development Commission and Metropolitan Service District.

Without reaching the other issues, the federal magistrate recommended, and the District Court decided, to abstain pending resolution of the state law questions in the state agencies and courts. On appeal by petitioners, the United States Court of Appeals for the Ninth Circuit dismissed the complaint for failure to state a claim.

History of State and City Land Use Process

In 1973 Happy Valley adopted a comprehensive plan for all city lands, including petitioners.' Later that same year, the Oregon legislature enacted Or. Rev. Stat. Ch. 197, which required all cities and counties in the state to enact new comprehensive plans and zoning ordinances. The new plans and ordinances are required to conform to statewide planning standards or "goals" which were enacted by a new state agency, the Land Conservation and Development Commission ("LCDC"), in 1975. *See* Or. Admin. Rules Ch. 660 (Appendix). The plans and ordinances of the cities

and counties in the Portland metropolitan area were also required to conform to requirements of a regional planning agency now known as the Metropolitan Service District ("MSD"), formerly known as the Columbia Region Association of Governments ("CRAG").

The petition correctly states (at pp. 8-9), that in August 1980, respondents adopted an entirely new comprehensive plan and zoning ordinance for Happy Valley. The city's new plan and ordinance increased residential densities city-wide. Specifically, petitioners' lands were reclassified as follows (*See* Appendix A, below, and Exhibit A at pp. 50-52):

Petitioner	Total Acreage	Number of Dwellings Permitted	Dwelling Units Per Acre (Net)
Fujimoto	72	204	2.83
Guy	30	55	1.83
Eisert	43	126	2.93

Unlike the prior city plan and ordinances, the new plan and ordinances permit "clustering" of housing to achieve these densities, and commit to extend all necessary municipal services, including sewer, on a "timely, orderly and efficient" basis.

Rather than develop their properties under the 1980 plan and ordinances as they could, petitioners elected to contest the 1980 plan at LCDC claiming that the plan did not permit housing at densities sufficient to satisfy LCDC's housing standards and advocated higher densities, six dwellings per acre. The state law dispute over the city's housing obligations is now pending in the Oregon Court of Appeals (Case Nos. CA A-25552 and CA A-24967).

REASONS FOR DENYING THE WRIT

1. This cause has become moot.

Petitioners' complaint was filed in 1978. In August 1980, Happy Valley adopted a new comprehensive plan. Under the plan, petitioners may develop their properties at overall residential densities ranging from 1.83 to 2.93 dwelling units per acre. The plan contains commitments by the city to extend such public facilities and services, including sewer and water, as are necessary to achieve these densities on a "timely, orderly and efficient" basis. (*Id.* at 67-69). The new comprehensive plan and zoning ordinance permit clustering and planned unit developments to achieve the stated housing densities. (*Id.* at 42-43).

The comprehensive plan is "* * * the controlling land use planning instrument for a city." *Baker v. City of Milwaukie*, 271 Or.

500, 514, 533 P.2d 772 (1975). It is a legislative act which is "* * * permanent in nature." *Id.* Having adopted the plan, Happy Valley is now obligated to effectuate the plan by adopting zoning ordinances and making land use decisions in accordance with it. *Id.* at 510, 514.

Petitioners have not applied to the city, as they could, for approval to develop their properties to the densities permitted in the 1980 plan, even though these densities are generally greater than those allowed by the city's zoning ordinances at the time petitioners acquired their properties. *See Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980). Rather, petitioners have elected to await the outcome of pending state court litigation which may increase their densities even further, to six dwelling units per acre.

There is no case or controversy to be determined by the Court because the comprehensive plan now in effect changed all relevant city policies and established new, more valuable uses for petitioners' lands. This Court reviews the issue of mootness by considering a statute as it exists at the time of the review and not as it existed when the case was commenced. *Hall v. Beales*, 396 U.S. 45, 48 (1969).

The comprehensive plan is similar to an administrative rule. In those cases where rules have changed or new data is available at the time the matter is being considered by the federal courts, the cases will be remanded for dismissal because of mootness. In *Wilderness Public Rights Fund v. Kleppe*, 608 F.2d 1250 (9th Cir. 1979), *cert. denied, Wilderness Public Rights Fund v. Andros*, 446 U.S. 982 (1980), appellants challenged the method used by the National Park Service in determining an allocation for the use of the Colorado River based on 1972 data. A new study was completed during the pendency of the litigation which changed the allocation and made the challenge to the earlier interim management allocation plan moot. In *Tennessee Gas Pipeline Co. v. Federal Power Commission*, 606 F.2d 1373 (D.C. Cir. 1979), *cert. denied*, 445 U.S. 920 (1980), the gas pipeline company challenged two orders of the Federal Power Commission declaring the company's curtailment of natural gas deliveries unjust and preferential. The challenge was declared moot because, while it was pending, the company ended its curtailment program.

In this case, petitioners may, under the 1980 comprehensive plan, develop their properties at densities greater than those allowed at the time their complaint was filed in 1978. Petitioners are challenging decisions and policies that no longer exist and no longer affect the

development of their properties. It is the existing law and not that in effect at the beginning of the action which must be considered. Petitioners' claim is now moot.

2. There Has Been No Taking, Temporary or Permanent.

The Just Compensation clause states: "[N]or shall private property be taken for public use, without just compensation." A threshold question in any "regulatory taking" case is whether property which at some point in time had economic value is rendered worthless by government action. Government has no constitutional duty to make worthless land valuable. Its duty, absent a legitimate state interest, is not to make valuable property worthless. *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980); *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 122-29 (1978), and cases cited.

Petitioners' complaint and affidavits state that because of poor soils, petitioners' land cannot profitably be farmed or forested, and needs sewers to be developed economically for houses. Stated differently, petitioners complain that because of the natural characteristics of the soils, their properties are worthless unless the city facilitates high density housing development by extending sanitary sewers.

> "Until this property is provided with public sewers and a density of development is allowed which makes installation of those sewers economically feasible, this property has no economic use." Petition, p. E-11. *See also* Petition, p. E-9.

Reduced to essentials, petitioners' complaint is that the city had a constitutional duty to sewer their properties and thereby make them economically useful for housing development, since the land was otherwise worthless because of its poor soils.

This is not a case in which property rights or land uses are alleged to have been diminished by government regulation. In every regulatory taking case, there is at least an allegation that government regulation has diminished the value of property. For example, in *Agins v. City of Tiburon*, 447 U.S. 255 (1980), plaintiff's property was downzoned to an "open space" classification after it was purchased. In *San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621 (1981), land which, when acquired, was zoned "industrial" was subsequently downzoned to "agricultural" and "open space." In *Village of Euclid v. Ambler Realty*, 272 U.S. 365 (1926), the initial imposition of zoning diminished plaintiff's

property value by seventy-five percent.

In this case, petitioners' properties were at all times prior to 1980 zoned R/20, a zone in which lots larger than 20 thousand square feet were permitted. Happy Valley did not downzone petitioners' lands. Nor did respondents take sewers from petitioners. Petitioners, as all Happy Valley landowners, never had sewers. Petitioners' complaint is not that the city changed the rules, it is that it should have.

Happy Valley was incorporated in 1965 to maintain low residential densities and a semi-rural environment. This was a perfectly legitimate state purpose, *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 129 (1978), " . . . clearly within the reach of the police power." 1 R. Anderson, American Law of Zoning, §7.06 at 545 (2d Ed. 1976). The city was not constitutionally required to change its land use policies and regulations at the expense of this purpose to make petitioners' real estate investments profitable.

Petitioners do not complain that their property had fewer uses the day the complaint was filed than when they bought it. If the allegations of the complaint are true, because of its poor soil the land never had any value. Baldly stated, petitioners complain their property was "taken" because the city did not *give* them economic land uses they never had. A constitutional prohibition on "takings" is one thing. A constitutional duty to give is quite another.

This is a case where land speculators invested in unserviced, undeveloped land on the urban fringe expecting development pressures and urbanization to come their way faster than it has. The United States Constitution does not guarantee them a profit.

3. Uncertainties in property rights which may have arisen during the Oregon statewide land use planning process are not compensible.

Petitioners allege there has been a "temporary taking" in this case. Respondents are uncertain what petitioners' argument is. If petitioners are alleging that the city's planning process, which consumed a number of years, created uncertainties as to the petitioners' property rights and a "taking," petitioners have failed to state a claim.

Happy Valley was incorporated in 1965 to protect itself against external development pressures and to preserve its low density, semi-rural character. In 1973, Oregon enacted a unique, ambitious, statewide land use planning law, Or. Rev. Stat. Ch. 197, and two

years later the new state land use planning agency, LCDC, enacted the planning standards or "goals." The law requires all cities and counties in the state to prepare and adopt entirely new comprehensive plans and zoning ordinances, and to submit them to LCDC for an approval known as "acknowledgment of compliance with the goals."

For many years after the enactment of Or. Rev. Stat. Ch. 197, there was considerable uncertainty about the legal effect of the new laws and standards on pre-existing local comprehensive plans and zoning ordinances, and confusion about the meaning and requirements of the statewide goals. Specifically, it was unclear whether the new laws and requirements would enable Happy Valley to continue to implement the purpose for its municipal existence, or whether Happy Valley would have to extend municipal services to facilitate higher density development.

Until it commenced work on its 1980 comprehensive plan, Happy Valley resisted land use designations and public facility and service commitments that would necessitate high density growth. For example, as petitioners complain, the city resisted and argued against inclusion of its land within the Portland metropolitan area urban growth boundary, that is, an "urban" designation, and annexation of city lands to a county sewer service district. The city's reason for doing so, to prevent overcrowding of land and undue concentration of population, was a "legitimate state interest," *Agins v. City of Tiburon*, 447 U.S. at 261, "* * * clearly within the reach of the police power." 1 R. Anderson, American Law of Zoning § 7.06 at 545 (2d Ed. 1976).

Beginning in 1978, one month before the filing of the complaint in this case, state land use policy began to develop in a way pertinent to Happy Valley. In April of that year, LCDC interpreted its Housing Goal, Goal 10, to require each city in the Portland metropolitan area to provide a portion of the regional housing stock necessary to accommodate projected year-2000 regional population growth. *Seaman v. City of Durham*, 1 LCDC 283 (1978). Thereafter, the LCDC upheld a decision of the Portland regional planning agency, the Metropolitan Service District, to include Happy Valley in the metropolitan urban growth boundary. *See Fujimoto v. Metropolitan Service District*, 2 LCDC 295 (1979).

Pursuant to these directives, in 1980 Happy Valley adopted its new comprehensive plan which increased housing densities city-wide, and commits the city to extend such public facilities and

services as may be needed to develop at those densities. Petitioners have challenged this plan maintaining, among other things, that the housing densities are still not high enough to satisfy state housing policy. This controversy as to state housing policy is now pending in the Oregon Court of Appeals (Case Nos. CA A-25552 and CA A-24967).

Petitioners contend that a temporary diminution in their property values arising from respondents' land use decisions is compensible. Even assuming that the decisions and acts complained of in this case temporarily diminished the value of petitioners' property, those decisions and actions were incidental to and concurrent with a statewide land use planning process in which Happy Valley, the Metropolitan Service District, and the LCDC were and are engaged. That decisionmaking process is, for Happy Valley, in its final stages, and has already benefitted petitioners. Depending on the outcome of the pending state court of appeals cases, petitioners could be benefitted even further.

In *Agins v. City of Tiburon*, 447 U.S. 255, (1980), the city downzoned plaintiffs' property to an "open space" classification (one dwelling per five acres), and shortly thereafter instituted eminent domain proceedings against the land. A year after the eminent domain proceedings were instituted, they were abandoned. Plaintiffs contended, first, that the downzoning constituted a "taking"; second, that the city's aborted attempt to condemn the land had destroyed its value during the pendency of the eminent domain proceedings. This Court rejected both claims stating, with respect to the second:

> "Mere fluctuations in value during the process of governmental decisionmaking, absent extraordinary delay, are 'incidents of ownership.' They cannot be considered as a 'taking' in the constitutional sense'." 447 U.S. at 263, n.9.

In this case the governmental decisionmaking complained of has been incidental to a highly technical joint local-regional-state agency land use planning process. It has been time consuming and is not yet complete. Of Oregon's roughly 278 cities and counties, as of October 2, 1982, only 154 had completed the process. (Source: Oregon Department of Land Conservation and Development). Four counties and fifteen cities had not completed comprehensive plans or submitted them to LCDC for approval. The plans of sixteen counties and fifty-seven cities, including Happy Valley were

disapproved by LCDC and had not been returned with modifications for another review. *Id.*

The time it has taken Happy Valley, given the legal and technical complexity of the process, has been neither unusual nor extraordinary. If this Court were to hold, as petitioners suggest, that uncertainties associated with the Happy Valley—statewide planning process have given rise to a "temporary taking" claim, the same would doubtless be true with respect to some if not all the other roughly 124 cities and counties whose plans and ordinances are not yet complete or acknowledged. This result could cripple or destroy a land use system Oregon has spent nearly ten years and over twenty million dollars to implement, and which is now nearing completion. Indeed, petitioners' $2.2 million prayer is roughly ten percent of the state's ten-year planning budget.

Even if the governmental decision making in this case caused a temporary loss in the value of petitioners' property or a temporary reduction in their ability to sell or develop, such temporary loss does not constitute inverse condemnation or a "taking."

4. The District Court correctly abstained from deciding this case.

Petitioners request an adjudication that there has been a Fifth Amendment "taking" of their property. In order to determine this question, the federal courts must look to state law to determine what property rights, if any, exist with respect to the property. To the extent that petitioners' property rights were not fixed by the 1973 and 1980 Happy Valley comprehensive plans, they are now being established through the Or. Rev. Stat. Ch. 197 statewide planning process and litigation associated therewith, and will be fixed once that process has been concluded.

While "[a]bstention from the exercise of federal jurisdiction is the exception, not the rule," *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 813 (1976), federal abstention is appropriate:

> (a) in cases involving a federal constitutional issue which might be mooted or presented in a different posture by a state court determination of state law, *Id.* at 814; *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496, (1941); *Louisiana Power & Light Co. v. City of Thibodaux*, 360 U.S. 25 (1959);
>
> (b) in cases presenting difficult questions of state law involving policy problems "of substantial public import" or

where a federal court determination "would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern." *Colorado River,* 424 U.S. at 814; *Burford v. Sun Oil Company,* 319 U.S. 315 (1943); *Louisiana Power,* 360 U.S. 25 (1959).

The Happy Valley planning process clearly involves policy problems of substantial state import. These issues are at least as "intimately involved with sovereign prerogative" as the eminent domain power challenged in *Louisiana Power,* 360 U.S. at 28. A resolution of these issues in federal court would be disruptive to the efforts of the State of Oregon to "establish a coherent policy with respect to a matter of substantial public concern." *Colorado River,* 424 U.S. at 814. *See* Or. Rev. Stat. §197.010:

> "**Policy**. The Legislative Assembly declares that, in order to assure the highest possible level of liveability in Oregon, it is necessary to provide for properly prepared and *coordinated comprehensive plans* for cities and counties, regional areas and the state as a whole. These comprehensive plans:
>
> * * *
>
> "(4) Shall be prepared to assure that *all public actions are consistent and coordinated with the policies expressed through the comprehensive plans.*" (Emphasis supplied).

In the present case, the District Court correctly noted that abstention is appropriate when:

> "(1) The Complaint touches upon a sensitive area of social policy upon which federal courts ought not to enter unless no alternative to its adjudication is open;
>
> "(2) Such constitutional adjudication plainly can be avoided if a definitive ruling on the state issue would terminate the controversy; and
>
> "(3) The possibly determinative issue of state law is doubtful." Petition for Certiorari, p. B-2.

The District Court relied upon *Canton v. Spokane School District No. 81,* 498 F.2d 840, 845 (9th Cir. 1974). *See also Isthmus Landowners Association, Inc. v. State of California,* 601 F.2d 1087 (9th Cir.1979); *Newport Investments, Inc. v. City of Laguna Beach,* 564 F.2d 893 (9th Cir. 1977); *Sea Ranch Association v. California Coastal Zone Conservation Commission,* 537 F.2d 1058 (9th Cir. 1976); *Rancho Palos Verdes Corp. v. City of Laguna Beach,* 547 F.2d 1092 (9th Cir. 1976). For the reasons stated by the District Court, these criteria are satisfied in this case.

Petitioners incorrectly cite three cases in an effort to show a conflict among the circuits whether *Pullman* or *Burford* abstention is appropriate in a case such as this: *Hernandez v. City of Lafayette*, 643 F.2d 1188 (5th Cir. 1981), *cert denied*, 102 S.Ct. 1251 (1982); *Nasser v. City of Homewood*, 671 F.2d 432 (11th Cir. 1982); *Heritage Farms Inc. v. Solebury Township*, 671 F.2d 743 (3rd Cir. 1982). In *Hernandez*, abstention does not appear to have been argued, and was not discussed. In *Nasser*, abstention was not applied because the issues of state law were not "uncertain or ambiguous"; and there was no likelihood that resolution of state law questions would "moot or present the federal questions in a different posture." 671 F.2d at 439. In *Heritage Farms*, plaintiff alleged that defendants' zoning decision was motivated by an attempt to prevent competition with defendants' own nearby businesses, and that defendants made false statements to financial institutions to prevent plaintiffs from securing loans. The court correctly stated that abstention is warranted when state land use policies may be threatened by a federal court decision, but held that abstention was inappropriate in the presence of allegations of fraudulent activity for personal gain, "corruption" and "defamation." Thus in one case, abstention was not discussed; in two the criteria for abstention applied by the District Court in this case were found inapplicable. Each of these cases is distinguishable from the present case. There is no conflict among the Circuit Courts.

In this case, the state regulatory agency, LCDC, the regional planning agency, the Metropolitan Service District, Happy Valley, and the state courts have been and are currently resolving the rights of petitioners respecting the development of their land. The process now underway in the state could enable petitioners to develop their land in any manner they wish and render this case moot, if it has not done so already. Any decision by a federal court prior to the conclusion of this process would be premature and disruptive to the effective functioning of the state land use planning process. *See Webber v. Skoko*, 432 F. Supp. 810 (D. Or. 1977). The District Court's order of abstention was proper in this case.

5. Alternative Reasons for Denying the Writ.

Assuming, arguendo, that this Court holds that this case is not moot, that the District Court erred in abstaining, or that the Court of Appeals erred in dismissing the case, the case should be partially or totally dismissed on the alternative grounds cited in respondents' original motion for summary judgment. These grounds are:

(a) The case is not ripe;

(b) The plaintiffs have failed to join necessary parties the LCDC and Metropolitan Service District; and

(c) Plaintiffs have failed to state a claim for inverse condemnation.

These grounds were fully argued in respondents' brief to the Court of Appeals (Appellees' Brief at pp. 14-24), and in the motion for summary judgment (Excerpt of Record in Court of Appeals at pp. 192-202; 219-236). Those arguments will not be repeated here. Even if there were a substantial constitutional question in this case, it would not be in a fit posture for decision by this Court.

CONCLUSION

For these reasons, the writ of certiorari should not issue.

Respectfully submitted,

WOLF, GRIFFITH, BITTNER,
ABBOTT & ROBERTS

Frank Josselson

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Telephone: (503) 222-4422

APPENDIX A

Benkendorf & Associates Ltd.
620 S.W. Fifth Avenue
Portland, Oregon 97204
(503) 226-0068

November 2, 1982

Mr. Frank Josselson
Wolf, Griffith, Bittner, Abbott & Roberts
800 Benjamin Franklin Plaza
1 S.W. Columbia
Portland, Oregon 97258

Subject: Eisert-Guy-Fujimoto properties within the City of Happy Valley

Dear Mr. Josselson:

As the land use planning consultants to the City of Happy Valley, we have been asked to review the above-mentioned properties in the context of the development potential under the adopted Happy Valley Comprehensive Plan. In addition to the Eisert-Guy-Fujimoto properties, we have reviewed the immediately surrounding properties. The limits of our review are illustrated on the accompanying map, marked Exhibit 1.

It is our determination based on the elements of the Happy Valley Comprehensive Plan, especially Exhibit 10-Land Use Plan, that the subject properties have been designated for the following residential land uses:

Guy	6 dwelling units per acre on approximately 3.5 acres 2 dwelling units per acre on approximately 16 acres 1 dwelling unit per five (5) acres on approximately 10 acres
Eisert	4 dwelling units per acre on approximately 20 acres 2 dwelling units per acre on approximately 23 acres
Fujimoto	4 dwelling units per acre on approximately 25 acres 2 dwelling units per acre on approximately 52 acres

Based on the above density determinations, the total units for the properties are:

Guy: 55 units
Eisert: 126 units
Fujimoto: 204 units

The residential density designations within the city of Happy Valley have been established for all lands within the city, based largely on the natural physical characteristics. Such factors as steep slopes, soils, geology, and drainage channels inhibit development potential. As a result, the residential land use designations permit low to moderate residential densities. Only the most suitable areas of the city have been designated for the maximum development potential of six (6) units per acre. Much of the city is designated for two (2) and four (4) units per acre, with smaller areas designated one (1) unit per acre. Those areas exhibiting the poorest physical qualities have been designated for one (1) dwelling unit for every five (5) acres.

A review of the city's adopted Comprehensive Land Use Plan Map reveals that the Guy property is surrounded on two sides by lands designated one (1) unit per acre and six (6) units per acre. The remaining sides are abutted by lands under the jurisdiction of Clackamas County because the site is located in the very northwesterly corner of the city. The Eisert property is surrounded by lands designated one (1) unit for every five (5) acres on the east, two (2) units per acre and four (4) units per acre on the south, one (1) unit for every five (5) acres and two (2) units per acre on the west, one (1) unit per acre and two (2) units per acre on the north. The Fujimoto property is bordered by lands designated two (2) units per acre and four (4) units per acre on the east, two (2) units per acre and four (4) units per acre on the south, four (4) units per acre on the west, and two (2) units per acre on the north. Please see Exhibit 1 for specific land use designations.

We believe this letter fulfills your request for information on this matter. If you require additional information, please call at your convenience.

Yours sincerely,

Al Benkendorf AICP

AB:rp/cc
Enclosure: Map

EXHIBIT 1

CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of November, 1982, three copies of this Brief in Opposition to Petition for Writ of Certiorari were mailed, postage prepaid, to Terry D. Morgan, Esq., Morgan & Shonkwiler, P.C. 205 Metro Housing Center Bldg., 15555 S.W. Bangy Road, Lake Oswego, OR 97034, Counsel for Petitioners. I further certify that all parties required to be served have been served.

WOLF, GRIFFITH, BITTNER,
ABBOTT & ROBERTS

FRANK JOSSELSON
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Office - Supreme Court, U.S.
FILED
DEC 8 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-332

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

MAS FUJIMOTO, DELMER EISERT,
ROBERT GUY and AGNES GUY, Petitioners,

v.

CITY OF HAPPY VALLEY, et al, Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF

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APPENDIX A

Land Conservation and Development Commission Order of Denial, April 16, 1982 A-1

APPENDIX B

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APPENDIX C

Plaintiffs' Complaint (Excerpts) C-1

REPLY BRIEF

1. Cause is Not Moot

Respondents' assertions that this controversy has become moot contain two very different premises. The first rests upon the erroneous factual statement that Petitioners are now free to develop their property for some reasonably beneficial use under the City's 1980 comprehensive plan and zoning ordinance. This statement is irrelevant to this proceeding unless the Court is also willing to assume the second premise of Respondents' mootness argument: there is no compensation remedy for a temporary taking where the City adopts a plan and implementing ordinances which arguably confer development rights on previously restricted lands.

Respondents' mootness argument underscores the necessity for this Court to resolve the temporary taking question.

The landowners filed their complaint based upon the City's course of conduct dating from its 1973 comprehensive plan. The City ultimately rejected subdivision applications submitted under that plan. The City now contends that "the comprehensive plan now in effect changed all relevant city policies and established new, more valuable uses for Petitioners' lands." Respondents' Brief, p. 5.

This is precisely the reasoning that led Justice Brennan in his dissenting opinion in San Diego Gas & Electric Co. v. City of San Diego, 450 US 621, 101 S. Ct. 1287 (1981), to conclude that mere invalidation of otherwise confiscatory land use regulations were not a sufficient remedy under the Just Compensation Clause of the Fifth Amendment. Justice Brennan was particularly concerned with the ability of municipalities to transmute offensive

regulations into slightly different ones which may not put the property owner in any better position economically than he was before the enactment of the amendatory regulations. 101 S. Ct., supra at 1305, n. 22. Under Justice Brennan's formulation, the Just Compensation requirement of the Fifth Amendment is self-executing: "Once there is a 'taking,' compensation must be awarded." The enactment of new policies - if such policies truly terminate previously confiscatory regulations - will serve only to limit the period of liability for which the City was obligated to compensate the landowners.

In the instant case, the City has amended its regulations only after having deprived the landowners of all economically viable uses of their land for a period of at least seven years. In order to reach Respondents' arguments on mootness, this

Court would first have to determine the temporary taking question. Hence, the case is in a proper posture to resolve that substantial federal question.

Even if the Court were to find that a City could moot out an inverse condemnation claim by adopting amendatory regulations during the pendency of litigation, this effect would only result if the regulations provided the landowners with a real opportunity to realize a return on their investment. Respondents boldly assert that Petitioners now have such an opportunity to developer their property under the 1980 comprehensive plan. That statement ignores the State proceedings which have concluded since the enactment of the 1980 comprehensive plan. As of April, 1982, the City has no valid comprehensive plan under state law. Rather, LCDC has determined that the

City's plan is in violation of nine of fourteen applicable statewide planning goals. A-2.

Pursuant to Or. Rev. Stat. 197.251, LCDC has issued an order denying the City's request for an "acknowledgment of compliance" that its plan and ordinances are consistent with the statewide planning goals. A denial of acknowledgment contrasts with an order of continuance and is used only where required changes in the plan or regulations "affect many goals and are likely to take a substantial period of time to complete." Id. at Section (8).

The nature of the goal violations directly pertains to Respondents' assertions that the 1980 comprehensive plan affords landowners reasonable development rights. For example, the findings accompanying the order of denial

identify the following deficiencies in the City's plan and ordinances. With respect to Goal 6 (water resources), the City "has not adopted a time-specific facility plan for the provision of sewer to areas with failing septic tanks." B-9, 10. With respect to Goal 10 (housing), the City "has failed to recognize its regional housing density and mix obligations" and "there is inadequate commitment in the plan to provide urban-level services to otherwise buildable land." B-10. With respect to Goal 11 (public facilities and services), it is stated that "sewer and water facilities plans have not been prepared and adopted." B-11.

These deficiencies demonstrate that the City's plan was a sham, since Petitioners could not obtain public facilities and services necessary to develop their property. Following issuance

of LCDC's acknowledgment order, Petitioners could not have obtained development approvals at the densities designated in the City's plan without violating state law. This case is not moot, because the City continues to restrict the development of Petitioners' lands.

2. Oregon's Statewide Land Use Planning Process Not Affected by Temporary Taking Remedy

In the third section of their brief, Respondents assert that any interferences with Petitioners' property rights during statewide land use proceedings relating to Happy Valley are noncompensable. Respondents' position is simply another facet of their argument in Section 4 that the federal court should abstain from airing constitutional claims in order to avoid a chilling effect on Oregon's statewide planning system. In effect, Respondents urge the adoption of a doctrine of

exhaustion of state judicial remedies prior to a federal ruling on inverse condemnation. These arguments are advanced without any demonstration whatsoever of how a ruling on Petitioners' federal constitutional claims affects the statewide planning program.

Respondents' argument misses the point. Plaintiffs' Complaint is directed at the conduct of the City and its officials from the enactment of the 1973 comprehensive plan to the date of the filing of the complaint. The City admits that it engaged in activities to resist inclusion within the regional urban growth boundary and prevented the annexation of City lands to a county service district. The Complaint details a number of other ongoing efforts, including manipulation of the statewide planning process, which were allegedly designed to keep development out of Happy Valley. Petitioners have alleged that the

cumulative effect of the regulations and the City's course of dealings was to deprive them of all economically viable uses of the property during this period.

State proceedings regarding the City's planning process are totally irrelevant to the claims asserted in the Complaint. Petitioners do not complain merely that the City's planning process leading up to the adoption of a new plan consumed time (7 years). Rather, the gravamen of the Complaint is that the City knowingly and actively restricted Petitioners' use of the land during that process, thereby confiscating it.

The City's argument might have some merit if the restrictions on Plaintiffs' lands were somehow mandated by the state-wide planning process. If, for example, LCDC had required the City to impose a moratorium on residential development or

to reduce its densities or prevent the installation of sanitary sewers until it had adopted a plan which complied with the statewide goals, compensatory relief for the landowners might have an effect on the statewide program. The City cannot hide behind the statewide program to escape liability in this instance, however. In the first place, Oregon law provided that comprehensive plans were to remain in effect until revised under the statewide planning scheme. Or. Rev. Stat. 197.275(1) (1977 Rep. Pt.), repealed 1981 Or. Laws, c. 748, Sec. 56. Secondly, LCDC has interpreted the statewide goals to mandate urban responsibilities for the City of Happy Valley.

As Respondents admit in their Brief, the State of Oregon has adopted a "regional fair share program" under the statewide planning legislation. In Seaman v. City

of Durham, 1 LCDC 283 (1978), the Commission adopted a policy requiring each constituent government of the Portland metropolitan area to provide for its regional fair share of housing opportunities by planning for sufficient numbers of least and moderate cost housing units. Thus the State of Oregon has accomplished through administrative fiat what the State of New Jersey initially accomplished through judicial interpretation of the state's constitution in the landmark decision of Southern Burlington County NAACP v. Township of Mt. Laurel, 67 N. J. 151, 336 A2d 713 (1975). See generally, Morgan & Shonkwiler, Statewide Land Use Planning in Oregon with Special Emphasis on Housing Issues, in Stuhler & Freilich, The Land Use Awakening (1981) at 247.

It is the direction of the state's program rather than its existence that is

material to this proceeding. The adoption by LCDC of a regional fair share housing program has resulted in the denial of the City's acknowledgment request and a decree directing the City to provide for fair share opportunities and to prepare the necessary facilities plan for making development possible. Given these events, it is ironic that the City characterizes its planning efforts as pursuing "legitimate state interests."

This is not to say that the State's program is designed to benefit individual landowners subject to confiscatory land use regulations. Rather, the State's actions against the City are designed to promote the welfare of the Oregon households who cannot afford to live in the City because of its restrictive housing policies. If landowners acquire development rights in the process, it is only because private

housing production is the means toward the accomplishment of the State's fair housing policy. And even if some of Petitioners in this case obtain relief through the state administrative process (which will be determined in part through the appeals now pending in State court), they still must bear the cost of some ten years delay individually. It is these losses which is the subject of Petitioners' Complaint.

3. City's Liability is Apparent on Face of Complaint

Respondents suggest that no taking claim, either permanent or temporary, is stated on the face of the Complaint. It is not Petitioners' place at this point in the proceedings to argue the merits of the case. Nevertheless, Petitioners must demonstrate that the case is an appropriate vehicle for the resolution of substantial federal questions. The issue of remedy

cannot be reached unless the City's liability is ascertained from the face of the Complaint.

Respondents advance two grounds: (1) the Complaint does not establish that the Petitioners' lands were initially valuable and hence that a "down zoning" has been effected; and (2) the City is not constitutionally required to provide Petitioners with sewer services in order to make their lands valuable for development. (It should be noted that neither of these grounds were the basis for the Ninth Circuit's holdings). Petitioners are entitled to all reasonable inferences which can be made from the allegations in the Complaint.

Petitioners' lands have been "down zoned" by the City on at least two occasions prior to the filing of the Complaint in 1978. All of Petitioners'

lands were acquired during or prior to 1970. C-1, 2. Prior to inclusion in the City, the property was zoned for 15,000 square foot lots. The City's first zoning ordinance, which allowed for 20,000 square foot residential lots, was adopted in 1970. C-3. In 1973, the City adopted a comprehensive plan declaring portions of the Petitioners' property as open space. The remainder was subject to development guidelines which specified minimum lot sizes based on soil suitability for septic tanks. According to the landowners' consultant, who applied development standards under the plan to Petitioners' property, no economically viable use remained for the property. Petition, p. E-9.

As Respondents acknowledge, the plan is the controlling land use document in the State of Oregon. Baker v. City of Milwaukie, 271 Or 500, 514, 533 P2d 772

(1975). The adoption of the 1973 plan effectively superseded the R-20 zoning with respect to Petitioners' property. In 1977, the City established a minimum lot size of 1.5 acres throughout the City, constituting the second "down zoning" of Petitioners' property. Petition, p. D-23. From these allegations, the Court can determine that the City devalued the Petitioners' property through its enactment of regulatory measures.

Even if the sole acts complained of were the City's refusal to permit sewers inside its boundaries, a substantial federal question would be stated under the facts alleged in the Complaint. In Penn Central Transportation Co. v. City of New York, 438 US 104, 125 (1978), this Court instructed that regulations would be evaluated with respect to whether they had interfered with the landowners' "investment-

backed expectations." The allegations of the Complaint demonstrate that the Plaintiffs purchased their lands with the reasonable expectation that they could be developed for residential purposes. In addition to the residential zoning classification for the subject property, the lands were initially included in a sanitary sewer district in 1967. C-3 The City subsequently voted to withdraw from the service district. C-5.

Thereafter, state health officials directed the City to prepare a facilities plan for the installation of sanitary sewers. Petition, p. D-3, 4. The City was well aware of the fact that Petitioners needed sewers to develop their property. Indeed, the Petitioners on more than one occasion sought to obtain sewer service through annexation to the county service district. Petition, p. D-14, 23-26.

Nevertheless, the City actively attempted to keep sewers out of the City by procuring a "rural" classification from the regional planning agency, id. at D-7, and delayed the preparation of the facilities plan. Id. at D-5, 6. These allegations established that the landowners had reasonable investment-backed expectations that their property could be used for residential purposes with sanitary sewers and the City actively rather than passively opposed their attempts to procure sewer service. This is sufficient to state a cause of action under the Just Compensation Clause of the Fifth Amendment.

4. Abstention Issues as Independent Ground for Issuance of Writ.

Respondents would apparently revive the District Court's holding that abstention was appropriate in this case. Under Respondents' view, the mere fact that Oregon

has a statewide planning program should dissuade federal courts from exercising jurisdiction over federal constitutional claims. Respondents never explained how a claim for damages is disruptive to the State's land use planning process in general, much less how a damages award against the City of Happy Valley disrupts such efforts.

The issue deserves to be resolved. Must Petitioners wait an indefinite period of time for the conclusion of a state planning process which is not intended to benefit them in the first instance in order to vindicate federal constitutional rights? If, at the conclusion of that process, Petitioners do not have development rights, will the statute of limitations have run to preclude an award of damages for a temporary taking?

Petitioners stand on the statement that there is variance among the circuits

as to how the abstention doctrine should be applied to inverse condemnation challenges involving land use matters. The District Court's holding exemplifies the blanket abstention doctrine which was hitherto the rule in the Ninth Circuit and stands in contrast with the decisions cited in the Petition.

CONCLUSION

For these reasons, Petitioners' claim is not moot and the writ should issue.

Respectfully submitted,

MORGAN & SHONKWILER, P. C.

Terry D. Morgan, OSB #76259
Of Attorneys for Petitioners

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BEFORE THE
LAND CONSERVATION AND DEVELOPMENT
COMMISSION OF THE STATE OF OREGON

IN THE MATTER OF	)	DENIAL
THE CITY OF HAPPY VALLEY	)	ORDER
COMPREHENSIVE PLAN AND	)	
IMPLEMENTING MEASURES	)	ORS 197.251

This matter came before the Commission as a request from the City of Happy Valley on September 2, 1980, for Acknowledgment of Compliance pursuant to ORS 197.251 and the Commission Acknowledgment Rule, OAR 660-03-000 to 660-03-035. The Commission, having fully considered the City's comprehensive plan and implementing measures, comments and objections of interested parties, and the report of the Department of Land Conservation and Development, now enters its:

Findings of Fact

1. The City of Happy Valley comprehensive plan and implementing measures comply with Statewide Planning Goal(s) 3, 4, 7, 8 and 13 for the reasons set forth

in Section IV of the Department's report, dated January 28, 1981 as revised on December 21, 1981 which is by reference incorporated herein.

2. The City of Happy Valley's comprehensive plan and implementing measures do not yet comply with Statewide Planning Goal(s) 1, 2, 5, 6, 9, 10, 11, 12 and 14 for the reasons set forth in Section IV of the Department's report dated January 28, 1981 as revised on December 21, 1981 which is by reference incorporated herein.

Conclusions

1. The comprehensive plan and implementing measures of the City of Happy Valley require additional planning work for many Goals in order to be considered by the Commission to be in compliance with Statewide Goals.
2. A substantial amount of additional

time is necessary for the City to complete additional planning work necessary to bring its comprehensive plan and implementing measures in compliance with all Statewide Goals.

THEREFORE, IT IS HEREBY ORDERED THAT:

In accordance with ORS 197.251 and the Commission's Acknowledgment Procedure Rule, OAR 660, Division 3, the acknowledgment request for the City of Happy Valley is Denied and the City is required to submit a work program for Commission review and approval. This work program must show how the city will complete the compliance requirements outlined in the staff report which is referenced above. The work program must be submitted to the Department of Land Conservation and Development at its Salem, Oregon office by May 6, 1982. The Commission approval or approval as modified of the city's work program shall

be incorporated within and is enforceable through this order.

DATED THIS 16TH DAY OF APRIL, 1982.

FOR THE COMMISSION

/s/D. Lorin Jacobs
D. Lorin Jacobs,
Chairman
Land Conservation and
Development Commission

NOTICE: You are entitled to judicial review of this Order. Judicial Review may be obtained by filing a petition for review within 60 days from the service of this final Order. Judicial review is pursuant to the provisions of ORS Ch. 183.482 (ORS 197.650).

APPENDIX B

B-1

EXCERPTS FROM FINDINGS ON DENIAL ORDER

LAND CONSERVATION AND
DEVELOPMENT COMMISSION

ACKNOWLEDGMENT OF COMPLIANCE

City of Happy Valley

DATE RECEIVED:
September 2, 1980

DATE OF COMMISSION ACTION:
February 12-13, 1981
Revised November 19, 1981
Revised December 21, 1981

(Page 2)

IV. FINDINGS

Compliance Status

Happy Valley received $12,000 in Fiscal Year 1976-77, and used this money to hire a consultant to prepare a draft plan. The City rejected this plan. In 1977 Happy Valley was designated "Rural" by the Columbia Regional Association of Governments (CRAG). In the fall of 1978,

following LCDC's determination that there was insufficient justification for this "Rural" designation (LCDC 77-016), CRAG redesignated the City "Urban".

Happy Valley received an additional $5,490 in Fiscal year 1977-78. The City proceeded to work towards the adoption of a new plan based on a "volunteer" effort. Metro evaluated Happy Valley's second draft plan in July of 1979, and concluded that the City's justification for its low planned densities was inadequate. In October of 1979, the Department of Land Conservation and Development approved a finding of satisfactory progress, with the understanding that higher residential densities would be considered by the City in its planning process.

In the meantime, a consultant was hired by the City to develop a plan consistent with the Happy Valley "Urban" designation.

In November of 1979, Happy Valley requested a planning extension to July 1, 1980. The Department deferred final action on this request until Metro and the Department had an opportunity to fully review Happy Valley's draft plan. In March of 1980, Metro reviewed the City's third draft plan and recommended that a planning extension be approved with conditions. However, both the Happy Valley Landowners Committee and the Metropolitan Home Builders Association objected to Metro's review as being inconsistent with Commission policy established through the Metro UGB acknowledgment proceedings. On June 27, 1980 the Director approved the City's planning extension request to July 1, 1980. The Director's approval letter outlined Goal 10 housing expectations in

the Metropolitan region and buildable lands inventory requirements (see Appendix B). Happy Valley submitted its plan for acknowledgment review on September 2, 1980.

General Overview:

Happy Valley was incorporated in 1965 in order to control development and to preserve a rural way of living. Happy Valley's plan generally protects Goals 5 and 7 resources, but unduly restricts development on buildable land. The City's comprehensive plan is designed to maintain a low density semi-rural enclave in the growing Metropolitan region. Metro summarizes the regional implications of the City's urbanization policy and explains why such an approach violates several Statewide Planning Goals:

> "The key issue underlying the staff's recommendation for a continuance of Happy Valley's plan is the City's failure to

plan for an urban future. The City plans to develop a residential density of 2-2 1/2 units per acre. Metro staff finds that Goal 10 and Goal 14 requires at least six units per acre. The difference is between an urban and a rural future. Staff considers this to be a crucial shortcoming for both policy and practical reasons.

Policies adopted by Metro and the LCDC have clearly designated Happy Valley as part of the urban area. LCDC, under the UGB, and its review of Metro area jurisdictions, has established the principle - with which Metro has concurred - that cities within the Boundary must assume responsibility for meeting the region's housing needs. To acknowledge Happy Valley's plan which contemplates an essentially rural future, undermines the adopted UGB and treats unfairly other cities and counties who have worked in good faith to meet their responsibilities.

As a practical matter, Happy Valley should develop at urban densities. The City's location and accessibility and the future economic trends of the area make Happy Valley uniquely suited to accommodate an important share of regional growth.

Already, regional investments have improved transportation in and to the Happy Valley area. The I-205 freeway is and will continue to be the only major uncongested freeway in

(Page 4)

the Portland area. Other investments planned in Regional Transportation Plan (RTP) - improving McLoughlin Blvd. and widening Sunnyside Road to four lanes - will further improve Happy Valley, will have access to the only major radial corridor - Clackamas Expressway/ McLoughlin Blvd. - not operating at or above capacity. In addition, I-205 will be below capacity from Orchards, Washington, to Wilsonville. Tri-Met's Transit Improvement Program calls for bus service to Happy Valley by 1985. A north/south busline will connect Happy Valley with Light Rail Transit (LRT) at 122nd and Burnside and to Clackamas Town Center. Clackamas Town Center itself will be a major transit center with direct service downtown and along I-205.

Happy Valley will also have access to nearly 100,000 new jobs in the next two decades. Metro's Transportation Department has prepared detailed estimates of new employment by traffic zone.

These estimates project that nearly 15,000 new jobs will become available in the Happy Valley and Town Center traffic zones by year 2000, and that nearly 100,000 total new jobs will open in the I-205 Corridor between Orchards and Tualatin. This excludes new downtown jobs which will be easily accessible to Happy Valley residents.

The Clackamas Town Center area is destined to be a major growth center. A super regional shopping center, the nearby industrial areas in Clackamas County and better than average transportation access give this area a large comparative advantage in accommodating growth over other areas in the region.

The region has made a substantial investment in urban level service in this part of Clackamas County. Developing Happy Valley at low densities will undercut these investments and put more development pressure on jurisdictions whose resources are already hard pressed and who are relatively less capable of handling more growth.

Each of the major issues identified by staff in reviewing the Happy Valley comprehensive plan relate to the City's role in providing urban land for future growth. Housing density,

housing types, septic tanks, sewers, street and road standards and commercial land are controversial because, in each case, the City is attempting to retain a fundamentally rural character. Metro staff points out that it is necessary - because of Happy Valley's inclusion in the UGB - and appropriate - because of Happy Valley's advantageous location - for the City to develop at minimally urban levels."

(Page 5)

The following compliance deficiencies have been identified:

GOAL 1: Happy Valley does not have a plan policy for continuing citizen involvement consistent with its adopted CIP.

GOAL 2: Plan elements related to economic growth, housing, public facilities and services and transportation were not developed consistent with the City's urban role.

The City's "composite development

suitability" analysis has not been consistently applied in determining residential densities or in protecting resources.

The plan lacks a policy to coordinate with affected agencies in review and update.

Underlying residential densities in areas designated for public use are not clearly indicated in the plan.

GOAL 5: Wooded habitat areas on slopes of greater than 25 percent are not adequately protected.

Wetlands and historic resources are not consistently inventoried or appropriately considered in the development process.

GOAL 6: Happy Valley has not adopted a time-specific facility plan for

the provision of sewer to areas with failing septic tanks.

GOAL 9: Happy Valley has not considered the needs for commercial and employment opportunities consistent with its urban role in the region.

GOAL 10: Happy Valley has failed to recognize its regional housing density and mix obligations under Goal 10.

Residential plan designations are not consistent with the City's suitability analysis.

There is inadequate commitment in the plan to provide urban-level services to otherwise buildable land.

The Land Development Ordinance contains vague and discretionary approval standards for needed

housing at planned densities. Open space dedication and fee requirements have not been assessed for their impacts on housing costs.

GOAL 11: Sewer and water facilities plans have not been prepared and adopted.

GOAL 12: Happy Valley has not planned its transportation system to meet future urban development needs.

(Page 6)

GOAL 14: Happy Valley has not reviewed the impacts of allowing septic tank development.

APPENDIX C

C-1

EXCERPTS FROM PLAINTIFFS' COMPLAINT

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

MAS FUJIMOTO, DELMER EISERT, ROBERT and AGNES GUY,	Civil No. 78-476
Plaintiffs,	COMPLAINT FOR INVERSE CONDEMNATION AND CIVIL RIGHTS DAMAGES
vs.	
CITY OF HAPPY VALLEY, et al	DEMAND FOR JURY TRIAL
Defendants.	

4

Plaintiff Mas Fujimoto is the owner of approximately 90 acres of land within the incorporated limits of the City of Happy Valley. Approximately 50 acres of land, located in Section 35, T1S, R2E, W.M., form the subject of this appeal and hereinafter will be referred to as "the property." Mr. Fujimoto acquired the property in 1970.

5

Delmer Eisert is the owner of approximately 40 acres of land within the incorporated limits of the City of Happy Valley, located in Section 35, T1S, R2E, W.M. Mr. Eisert resided in the City of Happy Valley for approximately 20 years and acquired the property during the years 1963 and 1968.

6

Robert and Agnes Guy, husband and wife, are the owners of approximately 30 acres of land within the incorporated limits of the City of Happy Valley, located in Section 27, T1S, R2E, W.M. Mr. and Mrs. Guy acquired the property in 1965 and resided on contiguous land in the city for approximately six years.

25

The first council meeting for the city was held on November 17, 1965, at which Defendant Robnett was elected mayor of the city. The council adopted a building code and subdivision regulations on that date. The planning and zonning commission was created on January 20, 1966. Clackamas County rezoned land inside the city from

R-15 (single-family residential, 15,000 square foot lots) to R-20 (single-family residential, 20,000 square foot lots) on February 24, 1967. The city adopted a zoning ordinance establishing the R-20 district in 1970.

26

The voters of Clackamas County formed Clackamas County Service District No. 1 on March 24, 1967. The purpose of the Service District was to provide treatment facilities for sanitary sewers for the included territory. The City of Happy Valley was included within the original boundaries of the District. The city conducted an election on November 30, 1967, for the purpose of annexing to the Service District. By a vote of 112 to 99, voters approved annexation to the Service District. The city approved the annexation by Ordinance 21 on December 4, 1967.

27

Clackamas County subsequently determined that the City of Happy Valley residents could not be levied for the payment of the bonds which had been authorized for sale by the district without a further election by the district. Construction of the treatment facilities for sewage disposal proceeded on the assumption that Happy Valley would be serviced by the district. Representatives of the Service District made presentations to the city concerning the proportionate costs of interceptor sewer and treatment plant to city residents and methods of financing these obligations. Interceptors for transmission of sewage wastes have been constructed to the southern and western borders of the city.

28

The City of Happy Valley held public

hearings on annexation to the Service District in May of 1972. On October 10, 1972, the USDA Soil Conservation Service reported to the city council that the entire area of the city was unsuitable for subsurface waste disposal. The city conducted an election for annexation to the Service District on October 17, 1972. Happy Valley voters rejected annexation to the district by a margin of 7 to 1.

29

Defendants were aware of multiple septic tank failures within the city limits prior to the second annexation election.

30

Defendants, acting individually and in concert, under color of state law, failed to properly inform Happy Valley residents prior to the second annexation election of serious health hazards facing the city without the installation of sani-

tary sewers to correct existing sewage disposal problems. Individual Defendants used their offices to manipulate public sentiment against annexation to the district for the purpose of preventing increased development within the city boundaries.

CERTIFICATE OF SERVICE

I hereby certify that on this_____ day of December, 1982, three copies of the Reply Brief were mailed, postage prepaid, to Frank Josselson and Stephen F. English, of Wolf, Griffith, Bittner, Abbott & Roberts, Suite 800, One Southwest Columbia, Portland, Oregon 97258, counsel for Respondents. I further certify that all parties required to be served have been served.

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